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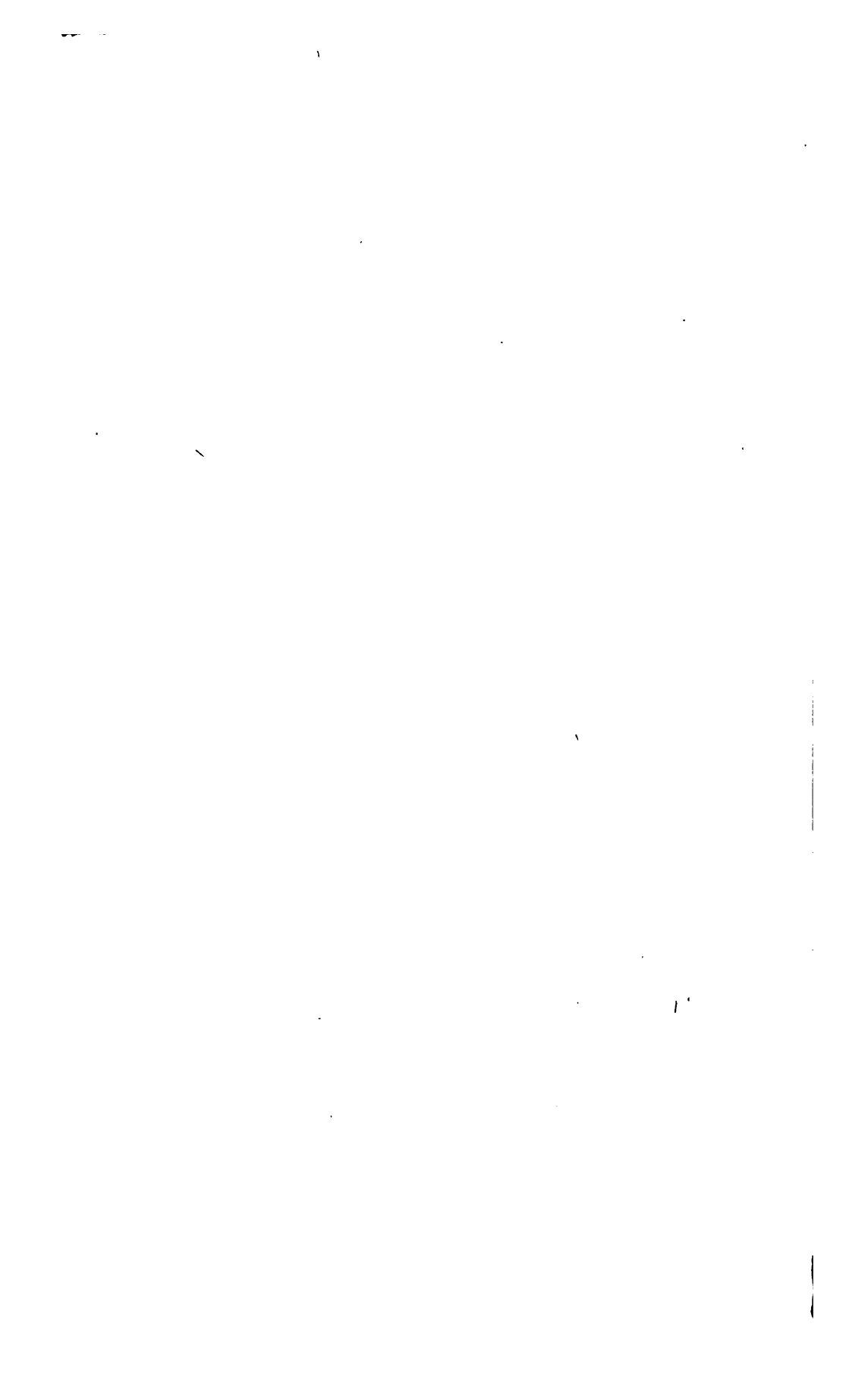
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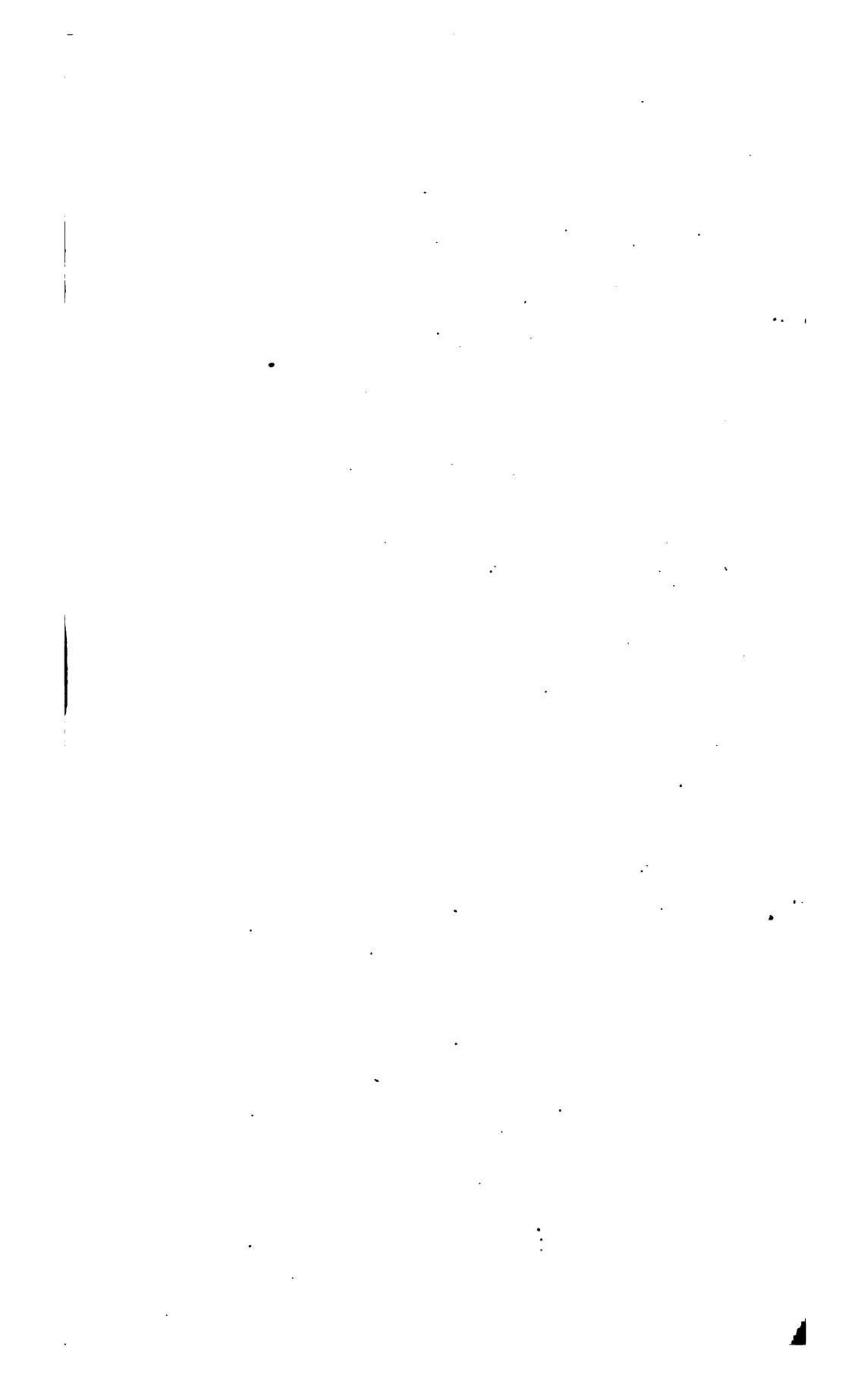
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REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED IN THE

S U P R E M E C O U R T

OF

THE STATE OF IOWA

BY W. PENN. CLARK
REPORTER.



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in the Clerk's office of the District Court of the United States, in and for the District of Iowa.

Rec July 9, 1857

JUDGES OF THE SUPREME COURT.

HON. GEORGE G. WRIGHT, Keosauqua, Chief Justice.
" WM. G. WOODWARD, Muscatine, }
" NORMAN W. ISBELL,* Marion, } Judges.
" L. D. STOCKTON,† Burlington. }

CLERK OF THE SUPREME COURT.

WILLIAM VANDEVER, Dubuque.

ATTORNEY-GENERAL.

DAVID C. CLOUD, Muscatine.

REPORTER.

W. PENN. CLARKE, Iowa City.

* Resigned in consequence of ill-health, to take effect on the second day of the June term, A. D. 1856.

† Appointed by the Governor, to fill the vacancy occasioned by the resignation of ISBELL, J., and took his seat on the bench on the 4th day of June, 1856



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ERRATA.

Page 5, 7th line from the bottom, for "on," read *or*.

" 6, 5th line from the bottom, for "county," read *country*.

" 316, 4th line from the top, the word *treated*, should be inserted between the words "be" and "in."

CASES
IN
Law and Equity,
DETERMINED IN THE
S U P R E M E C O U R T
OF
THE STATE OF IOWA;

IOWA CITY, DECEMBER TERM, A. D. 1855,

In the ninth year of the State.

PRESENT:

HON. GEORGE G. WRIGHT, CHIEF JUSTICE.

" NORMAN W. ISBELL, } JUDGES.
" WM. G. WOODWARD, }

ARNOLD *v.* GRIMES AND CHAPMAN.

Where, in an action of right to recover the possession of real estate, brought by the party holding the *legal* title, the defendant set up a defence, impeaching the patent under which 'the plaintiff' claimed, and the court decided against the defendant, on the ground that his defence was *equitable* merely, and could not be set up as a defence against the legal title, in that action; and where the defendant subsequently, brought a suit in chancery to set aside the patent of the former plaintiff, on the ground of fraud; *Held*, That the former suit was not a prior adjudication of the validity of the patent.

Under the act of Congress of 1830, regulating pre-emptions, there was no appeal from the decision of the register and receiver, allowing a pre-emption, and there was no appeal in such cases, until the act of 1841, when an appeal was given to the secretary of the treasury, by one whose claim for a pre-emption was rejected.

The register of a land office, in issuing a certificate of purchase, and the com-

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83	413
2	1
121	861

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missioner of the general land office, in issuing a patent, are but ministerial officers.

Where A., under the act of Congress of 1840, applied for a pre-emption, and took the oath required by the act of Congress, of 1838, and his claim was allowed by the receiver, and the register issued to said A. a certificate of purchase for the said land; and where the right of A. to the pre-emption, being contested by C., the commissioner of the general land office, directed the local land officers to hear testimony on the subject of the contest, and the commissioner subsequently canceled the certificate of A.; and where C., then claimed and proved up a pre-emption to the same parcel of land, under the act of 1841, received his certificate, March 21, 1843, and on the same day conveyed the land to G., in trust for the benefit of his creditors; and where a patent issued to C. on the 8th of March, 1845, and a patent was issued to A. on the 14th of March, 1849, which recited that the patent to C. had been revoked and canceled, being illegal; *Held*:

1. That when the government sold to A. in 1840, she parted with all her power over the land.
 2. That the substantial right was in A. and that the government held the title in trust for him, and could make no farther sale which would be valid, unless his purchase should first be set aside in a proper legal proceeding.
 3. That A. having obtained a patent, it attached in law to his original purchase, and his title was perfected.
 4. That the commissioner of the general land office, possessed no power, to cancel A.'s certificate of purchase.
- Land, once sold or appropriated by the government, even though not patented, cannot be sold again.

A junior patent under the first entry, will overreach an elder patent under a junior conflicting entry.

Where a patent has been issued through a mistake or fraud, to an individual who was not entitled to it, a court of equity will control the right of the patentee, by compelling him to convey to the person who has the better right. When a decree in chancery is offered in evidence, the court can look so far back as the *bill*, in order to ascertain from that, with the decree, *what* the court determined; but it cannot look at the testimony, with a view of ascertaining whether there was sufficient evidence to *authorize* such decree of the court.

Where, by a suit in equity, a deed was decreed to be canceled and held for naught, on the ground that it was obtained by fraud and duress; *Held*, 1. That the deed was void *ab initio*; and that the decree did not make the deed void, but only declared it so. 2. That even if the deed was not invalid and inoperative *ab initio* as to all persons, but only from the rendition of the decree; yet, as to the party who obtained the deed by duress and fraud, the decree would have a retroactive effect, and the deed was absolutely void as to him.

Where C. by means of a deed, which he had obtained by fraud and duress, contested A.'s right to a pre-emption, which was set aside; and where C. then obtained a pre-emption on the same land, received a certificate of purchase, and on the same day, assigned the certificate to G. in trust for the benefit of

Arnold v. Grimes and Chapman.

his creditors; and where G. admitted that he was cognizant of all the early facts of the case, and it appeared that G. had been a party to a suit by A. against C. to set aside the deed, and the decree in favor of A. vacating the deed, was rendered fourteen days before the issuance of the patent to C. under his certificate, which patent was subsequently revoked and canceled by the commissioner of the general land office; *Held*, That G. in point of *fact*, was a purchaser, with notice of all A.'s rights; and in point of *law*, he stood in the same attitude as C. himself
As between conflicting entries, the doctrine of notice is utterly discarded.

Appeal from the Des Moines District Court.

PRIOR to the pre-emption law of June 22, 1838, Arnold was settled upon the northeast quarter of section thirty-six in township seventy, north of range three, west of the fifth principle meridian, situate in Des Moines county, Iowa. W. W. Chapman was settled partly on the north side of the same quarter, and partly upon the adjacent tract. Chapman's improvements were on the said northeast quarter. They both settled upon these lands at an early day of the territory of Iowa, it being in 1835, and before the lands were surveyed; and the conflict of location arose, undoubtedly from this circumstance. A controversy arose and continued for some time, between A. and C. in relation to this quarter section, which controversy seems to have continued, on C.'s part, on account of his improvements being principally on the same. Arnold attempted to make a pre-emption of this quarter, under the act of June 22, 1838, but his right to a pre-emption was contested by Chapman, and he failed, from not being able to prove the required continuous residence. A. and C. then made a settlement and compromise of their difficulties, in which A., on the 29th of October, 1839, made to C., a warranty deed of twenty-seven acres off the north side of the above quarter, which included C.'s improvements.

The pre-emption act of June 22, 1838, contained this provision: That the person claiming the benefit of the act shall make oath, which oath "shall be filed with the register of the proper land office, when the land is applied for, and

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by said register to be sent to the office of the commissioner of public lands; that he entered upon the land which he claims, in his own right, and exclusively for his own use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatever, by which the title which he might acquire from the government of the United States, should enure to the use or benefit of any one except himself, or to convey or to transfer the said land, or the title which he may acquire to the same, to any other person or persons whatever, at any subsequent time; and if such person, claiming the benefit of this law as aforesaid, shall swear falsely in the premises, he shall be subject to all the pains and penalties for perjury, forfeit the money which he may have paid for the land, and all the right and title to the said land; and any grant or conveyance which he may have made in pursuance of such agreement or contract as aforesaid, shall be void, except in the hands of a purchaser in good faith, for a valuable consideration, without notice."

The pre-emption act of June 1st, 1840, then passed, continued in force the act of June 22, 1838, till the 22d June, 1842, "and the right of pre-emption under its provisions is extended to all settlers on the public lands at the date of this act," that is, on the 1st of June, 1840, "with the same exceptions, general or special, and subject to all the limitations and conditions contained in the" act so continued.

Under the said act of 1840, Arnold again applied for a pre-emption, based on a new settlement, took the oath required by act of 1838, and his claim was allowed, and the receiver issued to him the usual duplicate receipt or certificate of payment for the above quarter, dated October 10, 1840. The register also issued a certificate, of which the following is a copy:

"No. 7383. LAND OFFICE AT BURLINGTON, }
Iowa Territory, October 10, 1840. }

"It is hereby certified, that in pursuance of law, Rodney Arnold, of Des Moines county, territory of Iowa, on this

Arnold v. Grimes and Chapman.

day purchased of the register of this office, the lot or north-east quarter of section number thirty-six, in township number seventy, north of range number three, west; containing one hundred and sixty acres and — hundredths of an acre, at the rate of one dollar and twenty-five cents per acre, amounting to two hundred dollars and — cents, for which the said Rodney Arnold has made payment in full, as required by law. Now, therefore, be it known, that on presentation of this certificate to the commissioner of the general land office, the said Rodney Arnold shall be entitled to receive a patent for the land above described.

“A. C. DODGE, Register.

“Pre-emption Act, June 1st, 1840.”

On the face of this certificate, is written the word “canceled.” Chapman still contested Arnold's right of pre-emption, as appears (beside other ways), by his letters to the commissioner of the general land office, of date October 28, 1840, and June 28, 1841, and to the secretary of the treasury, June 30, 1841. With the last-mentioned letter, to the secretary, he sends a copy of the deed from Arnold to himself, certified by the recorder of deeds for Des Moines county. In this letter, he says, “my object is not to set aside his pre-emption, in order to enable me to bid upon *his* improvement, [but] to procure my own, which the unjustifiable act of the register and receiver has given him.” The commissioner, by letter of July 22, 1841, directs the register and receiver to notify the parties of time and place, and hear testimony on the question, whether the above deed from Arnold to Chapman was, on the 1st of June, 1840, [should it not be 10th June?] in full force, and unrevoked by a reconveyance on agreement to that effect. These officers so construed the above, that they declined receiving testimony offered by Arnold, to the effect that the deed was executed under *duress*, and so was invalid. Communication was made to the commissioner on this subject, and he, by letter of September 29, 1841, says: “The testimony offered by Mr. Arnold, should be received by you, inasmuch as if the deed referred

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to, was invalid, there existed, at the time he took the pre-emption affidavit, no contract or agreement *by which the title he would acquire*, should enure to the benefit of another," &c. "The validity of the deed is essential in the determination of the point at issue." Testimony was afterwards taken and forwarded to the commissioner, who, by letter of February 11, 1842, holds it insufficient, and notifies the register and receiver that the certificate No. 7383 (of Arnold's pre-emption), was canceled.

The next step in this history is, that Chapman claims and proves up a pre-emption of the *same* quarter section, under the act of 1841, and gets his certificate, March 21, 1843, and on the same day conveys the land to Grimes, in trust for the benefit of Chapman's creditors. Arnold then, in November, 1841, files his bill in chancery in the District Court of Des Moines county, against Chapman, alleging that the deed (from A. to C.) was obtained by duress and fraud, and that the same was void. Such proceedings were had in the cause, that at the term of February, 1845, (8th March), a decree was rendered, finding that "the bill and exhibits are true;" "that the deed be canceled and held for nought;" and that the contract and deed, and everything "connected therewith, be hereby rescinded and forever set aside." A certified transcript of the bill, answer, and decree in the above cause, was, on the 30th of May, 1845, transmitted to the commissioner, who replies on the 16th of June, 1845, that "the land has been sold to another person, and a patent issued therefor. This office, therefore, has no further control of the land, but must refer the party to the local court for further action on his claim." The patent referred to, issued March 8th, 1845. The commissioner was applied to after this decree, to issue a patent to Arnold, "in order to place him on an equality with Chapman in the courts of the county." On the 26th of January, 1846, he replies, referring to the decree, &c., and says "from which it would appear, that the deed before referred to, was obtained under duress from said Arnold; and has been held as utterly null and void." And he says further, "This office cannot, as

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explained verbally to you, issue a second patent for the same land; but it has no hesitation in advising you, that the decision of your chancery court, in reference to the deed herein referred to, removed the only ground of objection to the validity of the claim of Mr. Arnold, placing it in the same position it occupied before the question of its forfeiture was entertained, because of the existence of that presumed valid deed; and that, had no patent issued, and the question now presented was as to the issue of a patent, as between the two conflicting entries of Arnold, under the act of 1840, and of Chapman, under the act of 1841, this office would feel bound to give the patent to Arnold. I should think your chancery court fully competent to do Mr. Arnold full justice in the matter, in the present state of the case."

On the 8th April, 1845, Grimes filed his declaration in, and sued out a writ of summons from the District Court in Des Moines county, in an action of right, seeking to recover this land from Arnold. The cause came to the Supreme Court, and this court, at the May term, 1849, held Arnold's defence to be an equitable one, and therefore not available against the patent of Chapman, and say: "The case must be affirmed, upon the ground that the patent was not impeachable in this action, collaterally, for fraud, and therefore the evidence was correctly excluded." 2 G. Greene, 77, 86. On the 14th of March, 1849, a patent was issued to Arnold, reciting that the patent to Chapman had been revoked and canceled, being illegal. On the 5th of November, 1845, Arnold filed his bill in this cause, in which two amended bills have since been filed. In the court below, a decree was rendered against the complainant, who now appeals.

J. C. Hall and D. Rorer, for the appellant.

H. W. Starr and M. D. Browning, for the appellees.

WOODWARD, J.—The first question to be determined, is that of a prior adjudication. It is said that the case of *Kriechbaum v. Bridges*, 1 Iowa, 14, is conclusive upon this

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case. The cases are very unlike. In that, the defendant knew of his defence, but neglected to prepare it; he knew he wanted a witness who was absent; he knew a certain deed was lost, and that the acknowledgment of another was defective, so that it could not be offered in evidence without further proof. Yet he did nothing to remedy these difficulties, nor to supply the want. He neither asked a continuance, nor filed a bill in chancery, whilst in the case before us, Arnold did set up the whole matter of this suit as a defence in the former action of Grimes against him. The difficulty there was, that Grimes had the *legal* title, and Arnold's defence was of an equitable nature only, and the court decide against him, *merely* on this ground, and distinctly turn him over to a court of equity. See 2 G. Greene, 77, 86. And accordingly he is now in such a court.

We turn, then, to the inquiries which present themselves in this cause, in a court of equity. And it will be observed from the statement, that Arnold holds the senior certificate of pre-emption and the junior patent, whilst Chapman (or Grimes) holds the junior certificate and the elder patent. *All* of these papers, of course, cannot be valid; and it becomes necessary to ascertain which are, and which are not. In other words, it is necessary to ascertain what acts the commissioner of the land office, or other officer, can set aside, and what papers or documents of the nature of the foregoing he can annul and cancel. The first act which presents itself under this inquiry, is the cancelation, by the commissioner of the general land office, of Arnold's certificate of purchase under his pre-emption right. Had the commissioner the authority and power to do this? If he had, had he not also the authority to cancel and set aside Chapman's patent? When we come to the argument, we find it asserted that there was an appeal by Chapman from the decision of the register and receiver, allowing A.'s pre-emption, and that under this, the officer had the power. Did such an appeal exist in law? And was one taken? No act of Congress is found giving such an appeal, prior to that of September 4th, 1841, which allowed an appeal to the secretary of the treas-

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ury. The prior general pre-emption laws of May 29, 1830, June 22, 1838, and June 1, 1840, contain no such provision. But by the *instructions* issued upon the act of 1838, when the register and receiver decided against a claimant, and he, being desirous of it, requested in writing the opinion of the general land office, they are directed to transmit the papers and proofs. Thus far it would seem, that if the claim was *rejected* below, the commissioner might review it; but if the claim was allowed, and a certificate of purchase issued, no authority is yet seen for setting it aside. Besides, an appeal, as claimed, implies an adverse party. But Chapman was not then claiming a pre-emption of this land, and was not at the trial, for reason, as he says, that he was sick. Whatever may have been the reason, it will not be contended that his absence invalidated the sale. He did, indeed, deny and afterwards resist Arnold's right to pre-emption, but upon the ground stated to the secretary of the treasury of June 30, 1841, and above quoted. So that Chapman did not even stand in a position to appeal. In *Lytle v. The State of Arkansas*, 9 How. 315, 333, the Supreme Court of the United States, in regard to this same subject, say, "From their decision, no appeal was given." This was under the act of 1830; and it continued the same until that of 1841, when an appeal was given to the secretary of the treasury, by *one whose claim for a pre-emption was rejected*. Finally, *no appeal was taken*. This is manifest from the correspondence between Chapman, Arnold, and the officers, which is made evidence.

The following facts appear from the letters, with the certificates: The certificate of purchase, issued October 10, 1840. On the 28th of October, Chapman complains to the commissioner, that he had not been able to be at the hearing, and had no opportunity of defending his claim; applies for a hearing, and to have the case sent back, and requests that the patent may not issue. In a letter of the same date, to the secretary, he protests against a patent issuing, "because the papers are insufficient," and says, Arnold did not make out a case entitling him to the land. In May, 1841, the commissioner answers, that the evidence adduced in

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support of A.'s claim "being entirely satisfactory," and "no substantial reason being given for a rehearing, this office would not feel itself justified in remanding the case;" but says he will suspend the issuing of a patent a reasonable time, that C. may produce evidence showing that A.'s claim was not valid under the law. In June, 1841, C. intimates to the commissioner the existence of the deed from A. to him. In July, 1841, the commissioner answers, that the existence of such a deed was not in evidence before the officer, and says the absence of evidence "fully justified this officer in confirming the entry made." The same month he writes to the secretary, sending a copy of A.'s deed, and urging it as against law, and as rendering the sale void, and says, his object is not, to enable him to bid upon A.'s improvements, but to procure his own. In July, 1841, the commissioner writes to the secretary, that no reply was made to C.'s letters of October, 1840, to the commissioner and secretary, "in consequence of the expectance of a report from the land offices, as usual in a contested case, until May 29, 1841, when it was ascertained by the posting of the returns from the Burlington district, that the entry of Mr. Arnold, under the act of June 1, 1840, had been made, per certificate 7383." He afterwards sends the matter back to the register and receiver, to take testimony on the question, whether on the 1st (10th) of June, 1840, "said deed was in full force and unrevoked; or, in other words, whether there then existed a contract or agreement by which the title Arnold might acquire, should enure to said Chapman;" and on their asking instruction, he directs them to receive testimony showing the deed invalid, for, says he, "if invalid, there existed no contract or agreement by which the title he could acquire should enure to the benefit of another." In November, 1841, the testimony was taken and reported to the commissioner, who decided the matter adverse to A.; and in February, 1842, notified the register and receiver that A.'s certificate was canceled. It will be seen by the opening statement, that C. afterwards proved a pre-emption to the same lands, obtained a certificate, and in 1845, received a patent; and that in 1849, after

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the decree of the court canceling the deed, a patent issued to A. declaring that to C. canceled.

There was then *no appeal*, but when the existence of the deed was brought to the knowledge of the commissioner, he undertook to adjudicate the questions pertaining to it, and to the validity of A.'s purchase; and then listens to the action of the court, rescinds his doings, and remits the party to the legal tribunals of the country. Is not this where the government should have gone in the beginning, to set aside A.'s purchase? Was there a purchase, when payment was made, and that certificate was delivered? And if so, could the executive departments of the government adjudicate it, and set it aside. Justice McLEAN, in *Ware v. Brush*, 1 McLean, 535, says: "The register, in issuing the warrant, acted ministerially, and so did the commissioner of the general land office, in issuing the patent. They could determine no matter which settled the right between the parties. Their duties were ministerial, not judicial." And, "it would be against all authority and reason, to hold that the acts of a ministerial officer can fix, absolutely, the rights of the parties." In this case, the party having the equitable right, was suffered to prevail against the holder of the patent.

In *Rogers v. Brent*, 5 Gil. 574, the court says, "If the commissioner issues a patent to a person not entitled to it, either the state or federal tribunals, may inquire and determine who has the better right." "A title derived from the government is no better than one derived from an individual owning the fee, and must be adjudged by the same rules of law; and a fraud may as well be perpetrated in obtaining a title from the government as from an individual, and it is the duty of the court to protect the injured party against the one, as well as the other."

In *Carroll v. Stafford*, 3 How. 460, the Supreme Court of the United States hold this language: "When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held it for a final certificate, which could *no more be canceled by the United States than a patent*. It is true, if the land had been previously sold by the United States, or reserved from sale,

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the certificate might be recalled by the United States, as having been issued through mistake. In this respect, there is no *difference* between the *certificate* holder and the *patentee*."

"Now, lands which have been sold by the United States, can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchasers are considered, they are protected under the patent certificate; as fully as under the patent. Suppose the officers of the government had sold a tract of land, received the purchase money, and issued a patent certificate, can it be contended that they could sell it again, and convey a good title? They could no more do this, than they could sell land a second time, which had been previously patented. When sold, the government, until the patent shall issue, holds the mere legal title for the land, in trust for the purchasers; and any second purchaser would take the land charged with the trust."

In *Stoddard v. Chambers*, 2 How. 285, the plaintiff held under a patent, and the defendant partly under a New Madrid certificate, and partly under a patent issued on another similar certificate; and the court treats these alike, and says: "It has been urged, that the first patent appropriates the land, and extinguishes all prior claims of inferior dignity. But this view is not sustainable. The issuing of a patent is a ministerial act, which must be performed according to law. A patent is utterly void and inoperative, which is issued for land which had been previously patented to another individual." This language seems to be applied, as well to the land held under the certificate, as that held under the patent. That claimed under the certificate, was appropriated only by having the certificate located upon it.

In *Morton v. Blankenship*, 5 Missouri, 346, the subject undergoes a full examination. The court says: "But had the commissioner power to vacate Haydon's entry, to make room for Lowes? This is a power not given the commissioner by the act of Congress. Haydon (who held a certificate only) had purchased the land and paid for it, and the executive officer of the United States had no farther control

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over it, unless Haydon himself had applied to have his entry changed. No person can be deprived of life, liberty, or property, without due process of law. The proceeding by which Haydon's entry was attempted to be vacated, was clearly not a proceeding authorized by any law of the land, and was, therefore, an attempt to deprive him of his property, without due process of law. If his title was defective, this defect, under the existing laws, could be determined only in the courts of justice of the country." In this case, which was at law, the value given the certificate in relation to a patent, was by virtue of the state law, and our law is the same; but this point does not arise in the case at bar, which is in chancery.

In *Ross v. Basland*, 1 Pet. 655, a prior donation certificate held priority over a subsequent entry patent. And in *Bagnell v. Broderick*, 13 Pet. 450, an elder entry (or certificate), and junior patent, prevailed over an elder patent. Although the circumstances of these last two cases, differ from those in the one before us, yet it is conceived that the principle involved in them is the same, which is, that the land being once sold or appropriated (even though not yet patented), cannot be sold again. A junior patent, under the first entry, will overreach an elder patent under a junior conflicting entry. Where the patent has been issued, through a mistake or fraud, to an individual who was not entitled to it, a court of equity will control the right of the patentee, by compelling him to convey to the person who has the better right. See Justice McLEAN's opinion in *Bagnell v. Broderick*, 13 Pet. 455. This is a dissenting opinion, but these views do not conflict with those of the majority, and they are in accordance with the tenor of the cases. The dissent was upon the question, whether an elder certificate could prevail against a junior patent in an action at law, in a state allowing a certificate holder to maintain an action for possession, &c., upon his certificate. See also, *Ware v. Brush*, 1 McLean, 533; *Miller v. Kerr*, 7 Wheat. 212; *Boardman v. Reed*, 6 Pet. 328; *Threadgill v. Pintard*, 12 How. 24; *Bush v. Marshall*, 6 How. 284.

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The same law has been held by our own court in *Cavender v. Smith* (Burlington, May Term, 1851). Cavender's grantor purchased under a judgment rendered against Smith, whilst he held only the certificate of the register of the land office, Smith afterwards obtained a patent, and defends the action of Cavender, brought to recover the possession, by showing the legal title to be in himself by virtue of the patent. Of Smith's purchase by the certificate, the court say, "By this purchase, he acquired all the property which the United States had in the land. There was no reservation made. The sale was unconditional; the right acquired was absolute. All the equity, and in substance, the legal title, passed from the government to the purchaser, and the government retained only the formal, the merely technical, legal title, in trust for the purchaser, until the patent issued. Having once sold the land by certificate to one, the officers of the government could not sell it again, and convey a good title to another, even by patent, &c." And they cite and rely upon the case of *Carroll v. Stafford*, 3 How. 460.

It is worthy of observation, that in the correspondence, above somewhat freely quoted, the executive officer of the government, at length refers the parties to the judicial tribunals of the country for the determination of their rights. At about this period, this department adopts the correct view, and no longer takes upon itself duties of a judicial nature. In November, 1843, the commissioner of the general land office, under the direction of the secretary of the treasury, addresses a circular to the registers and receivers of the local offices, advising them, that *in future*, in adjudications upon pre-emption claims under the acts of 1838, 1840, and 1841, *no examination will be had, whether the person claiming has made any contract or agreement by which the right or title which he might acquire, would enure to the benefit of any other person, &c., a false swearing as to any of them*, he remarks, *being the proper subject of an examination by the judicial tribunals*. This instruction harmonizes the practice of the department, with the judicial decisions.

There are two or three cases, which, on a casual observa-

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tion, seem to oppose the foregoing conclusion. The first is, that of *Gray v. McCance*, 14 Ill. 344. This was a case of conflicting pre-emption claims, and the ultimate decision of it, was upon an appeal to the secretary of the treasury, under the act of 1841, which act, we have above remarked, expressly gave such an appeal. And farther, there are some reasons in favor of a greater extent of power in the officers in a case of conflicting claims, than in an *ex parte* claim once acted upon. And there is certainly a great difference between such a case, and an adjudication of forfeiture, under a penal act. But, in regard to the case of the original parties, Gray and White, the only ground on which Gray and McCance can stand, is this: that a pre-emption right has been held to be property—a vested right, to some extent. See *Threadgill v. Pintard*, 12 How. 24; *Brush v. Marshall et al.*, 6 How. 284; *Doyle v. Knapp*, 3 Scam. 337; *Pierson v. David*, 1 Iowa, 23. And under this view, the officers might, possibly, be sustained in taking notice of, and examining the claim of White, which was prior in time, though presented subsequently, to that of Gray; for the very ground upon which the cases cited by us proceed, is that of giving preference to the prior right. Another case is *Dickinson v. Brown*, 9 Sm. & Mars. 130. The leading feature of this case, in respect to the matter now in view, is, that it was an action at law, in which a certificate was contending against a patent. But the court does assert the existence in the officers, of that power which we have above negatived. They do it, however, in faint terms, without argument or authority, and upon an assumed practice, which the department or bureau has itself abandoned, at least so far as bearing upon a case like the one at bar. See Circular to the Land Officers, of Nov. 11, 1843.

Now, if titles derived from the government, possess no more sanctity than others, and if her contracts and sales are to be judged by the same rules of law, how does this case stand? Arnold held a title bond from the government, certifying that he had paid for the land, and was entitled to a deed (or patent). The vendor, by her executive officer

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(placing it in its strongest light), assumes to vacate this title bond, and set it aside. If this may be so done, where is the security of property?—where is the due process of law?—and where the law of the land?—and for what purpose are the judicial tribunals? But it is said, that if he swears falsely, he forfeits all right and title to the land. This is true, but who is to judge whether he has sworn falsely? He also subjects himself to the pains and penalties of perjury, but no commissioner ever assumed to inflict these penalties, and it is impossible to conceive how the commissioner could declare a forfeiture of his land, any more than he could inflict the pains of perjury. In order that he should forfeit the land, he must have sworn falsely, but what tribunal has “found,” that he has sworn falsely?—where is the record? We conclude then, that when the government sold to Arnold, in 1840, she parted with all her power over the land; that the substantial right was in A; and that the government held the title in trust for him, and could make no further sale which would be valid, unless his purchase should first be set aside, in a proper legal proceeding; and that, Arnold having obtained a patent, this attaches in law to his original purchase, and his title is perfected.

A further view, however, is presented, in this; that although the executive department of the government, may not have had authority to set aside Arnold's purchase, and to sell to Chapman, still the question remains for determination, by the judicial tribunals, whether the pre-emption of Arnold was not void, under the act of 1838. And the deed to Chapman is set up, as the *fact* in the way. We will examine the subject, under this view. The executive department of the government, after much conflicting action, sent the party to the judicial department. In obedience to this suggestion, he has so come. Grimes first brought him into a court of law, and there he set up his defence, consisting of the whole matter of this suit; but that court sent him into chancery, and accordingly he appears in this court. And here the argument stands thus: Chapman says that the act of 1838 was violated by the making of the deed from Arnold to him;

that A.'s pre-emption was void therefor; and that he forfeited all interest in the land. To this, the answer is, that A. instituted a suit in equity against Chapman and Grimes, in a court of competent jurisdiction, for the purpose of testing this precise question, and the decree of that court was, that the *bill* and *exhibits* are true, and that the *deed* be canceled, and held for naught. And this bill, thus found true, alleges that the deed was obtained by *fraud and duress*. This decree would seem to put an end to the question concerning the effect of the deed, and the forfeiture of the pre-emption right, in consequence of it; but counsel contend, that the deed was not canceled by the decree on account of duress, but that it was so done, in order to relieve Arnold from the covenants of warranty therein, because it was inequitable that these covenants should hang over A. when C. had acquired the title from the government. It is true, that although the commissioner had no authority to set aside the first purchase, and sell to another, yet the courts might inquire into the real rights of the parties, and therefore this part of the inquiry is important. With a view to this matter, we are asked to go behind the decree, and look into the evidence, and find there that there was no case of fraud, or duress made out—no testimony adequate to support such a decree. We can look so far back as to the *bill*, in order to ascertain, from that, with the decree, *what* the court determined, but we cannot look at the testimony, with a view of ascertaining whether there was sufficient evidence to authorize such a decree of the court. If that decree was erroneous, in this respect, there was a remedy well known, but we are not now sitting in appeal or error upon it. No lawyer would seriously expect us, *thus* to revise the judgment of another court.

But was that decree on the validity of the deed, or was it merely to get rid of the covenants impending over Arnold? When we look at the allegations of the bill, and the finding of the court, there remains no room for doubt or argument. The bill alleges that the deed was obtained by fraud and duress, and the judgment finds the bill to be true, and

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decrees the deed to be canceled and held for naught. The allegations and proof of the bill meet one case, and do not meet the other, and the judgment answers to the bill. But, again: what meaning is there in the argument, that the above bill and decree were only to set aside the deed, on account of the impending covenants? According to Chapman's positions in this cause, that deed was void—*absolutely void—dead in the birth*. This is his very argument, and he uses it to destroy Arnold's entry. The covenants, then, in an absolutely void deed, would never harm Arnold. And, further still: Chapman having set A.'s pre-emption aside, by means of that deed, and having then himself purchased the title directly from the government, how could he ever make use of those covenants against Arnold. They would seem to be hardly of consequence enough to warrant the costs of a suit.

Another position which is urged upon us, is this: that in the above decree, the deed is not avoided *ab initio*, but only in the *future*. Although it is not necessary to determine this point, for reasons which will appear presently, it deserves some attention. Had the decree been to set aside the deed, in respect to the covenants, it might very well be said to operate *in futuro*. But as the decree was to cancel and hold for naught that deed, because it was obtained by fraud and duress, *can* the operation of the decree be merely a prospective one. The decree did not *make* the deed void, but declared it so. If it was void, for that reason, when the judgment was rendered, it *had always been so*. It is said that a deed obtained by duress is *voidable*, not *void*. But if the books mean anything, it is conceived that they must mean, that such an act is void. The duress "annuls consent;" there is no *consent*; there is no agreement; "void things are as no things." And it is no answer, to say that it may be confirmed. See 2 Bac. Ab. 775; Tom. Jac. Law Dic. *in titulo*; 1 Bouv. Inst. 226; 2 Ib. 437, and *in titulo*; 3 Ib. 669; 2 Pars. on Con. 66; Story on Con., § 393, n. (1); § 400; Chit. on Con. 206; 2 Kent, 284, 453; Swan's Treatise, 8; *Worcester v. Eaton*, 13 Mass. 371; 3 J. J. Mar-

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shall, 659. But if the deed was not invalid and inoperative *ab initio*, as to all persons, but only from the rendition of the decree, it will make no difference as between A. and C. As to Chapman, at least, the judgment of the court would have a retroactive effect. The only doubt which could arise, would be, as to innocent third persons whose interests intervened. And this brings us to the next point made.

It is urged, finally, that Grimes is an innocent purchaser. If he *was* such a purchaser, yet he must lose, if Chapman's title had nothing to stand upon, as we are disposed to think was the case. But this case need not be placed upon that basis. The better question is, is Grimes an innocent purchaser? C. obtained his certificate, March 21, 1848, and on the *same day* conveyed to Grimes; and the latter says he was cognizant of all these early facts in the history of the case. Long before C. obtained his patent, Grimes had been made a party to the above-mentioned suit to vacate the deed, and the decree therein was rendered fourteen days before the issuance of the patent to C. In point of *fact*, then, Grimes was a purchaser, with notice of all A.'s rights; and, in a point of *law*, he stands in the same attitude: he is but Chapman himself, for he holds but as trustee for C.'s creditors. This is conceded throughout the case. Therefore, he is entitled to no notice of anything; or rather, in truth, he has notice of everything, and he takes no better right than C. had: he is to be dealt with *as* Chapman. And if he bought under judgments against C. in favor of creditors of the latter, this does not help him; for those creditors had liens on no more than C. was entitled to. Their judgments and liens, will not mend his title. Finally, Grimes standing in C.'s shoes, the rule becomes applicable to him, that, "as between conflicting entries, the doctrine of notice is utterly discarded." 13 Pet. 454. What matters it, then, whether the decree of the District Court found the deed void *ab initio*, or declared it void *in futuro* only. It is as effective in the one case, as in the other, so far as Chapman is concerned, and, consequently, so far as Grimes is, also.

As to Chapman, himself, a court of chancery would have

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to strain its conscience, to give him relief in any event. His improvements are on the quarter section which A. sought to pre-empt. He writes to the secretary:—"My object is not to set aside his pre-emption, in order to enable me to bid upon *his* improvements, but to procure my own," &c. Already had Arnold, not desiring to take them from him, made a settlement with him, which his own counsel calls *fair*, and conveyed to him the portion of land embracing those improvements. Why is he not content with this? Why does he not rest here? Arnold could never set up the provisions of the statute, to annul the deed. Chapman might have rested upon that deed, perfectly, securely. But, instead of this, he uses this deed to defeat Arnold's pre-emption, and then turns round and pre-empt's A.'s land and all his improvements. If the peremptory terms of statute law, rendered it necessary for a court of equity to allow a *particeps criminis* to take such an advantage, it would be, at least, an unwelcome duty.

Wherefore, it is considered, that the decree of the District Court be reversed, and that a writ of *procedendo* issue, directing the said court to render a decree in the above cause in conformity with this opinion.

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Where the denials in an answer in chancery, are positive and unequivocal, and made under oath, they must be overcome by the testimony of two credible witnesses, or other evidence of equivalent weight and force.

Each partner has a specific lien on the partnership stock, not only for the amount of his share, but for moneys advanced by him beyond that amount, for the use of the copartnership, as also for moneys abstracted by his copartner beyond the amount of his share.

But this right or lien is subordinate to the right of the joint creditors, to be first paid from the partnership capital, funds, or stock.

And where one partner sold two-thirds of the partnership property, in fraud of the rights of his copartner, whereby the partnership was dissolved, the purchasers having notice of the interest of the other partner; *Held*, That the

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purchasers took the property, subject to the right of the other partner to a lien for moneys advanced.

On an appeal in chancery, the facts, as well as the law of the case, are reviewed and re-adjudicated by the Supreme Court; and upon an examination of the whole case, this court will render such a decree as should have been entered in the first instance, consistent with the case made by the bill, and sustained by the proof.

Appeal from the Dubuque District Court.

IN the fall of 1852, the complainant and respondent, Wilson, entered into a business arrangement for carrying on a livery stable in the city of Dubuque. The terms of their agreement were never reduced to writing. In July, 1853, during the absence of complainant, Wilson sold out two-thirds of the establishment to his co-defendants, David De Lorimier and Manley Hannan, excepting certain carriages and other articles specified, of which he sold but one-half. The purchasers immediately took possession, and controlled and used the share so purchased, and have continued to so use and control the same. After his return, Pierce filed this bill, setting up that he and the said Wilson were equal partners in said livery business; that said sale was in fraud of his rights; that said Wilson had sold more than his interest; that complainant had put into said partnership in money and property, a large amount of means, and more than one-half; that Wilson refused to settle and account with him; that the other defendants had notice of his interest in said co-partnership; and praying that defendants be decreed to account to him for one-half of said livery stable and property so held and owned by the partnership, and of all stock and business of said firm; and that the property be decreed to be liable for the debts, and for general relief.

The defendants answer under oath, and deny substantially all the material allegations of the bill, except as hereafter stated. The answers, however, set up, that if any partnership existed, complainant was interested only to the extent of one-third, and Wilson owned the remaining two-thirds. The sale to De Lorimier and Hannan is admitted as alleged, and

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that they took possession in accordance with said sale. Wilson denied that he had refused to account with complainant; and averred that the refusal was on the part of complainant, and that he, complainant, was largely indebted to him on account of said livery business. He also sets forth said account. To these answers, complainant replies, re-affirming his bill, and stating his account. The cause was referred to a master to take an account, as also the testimony. Upon the coming in of this report, certain exceptions were taken to the same, by De Lorimier and Hannan, which were sustained, the bill dismissed as to them, and a decree rendered in favor of complainant, giving him one-third of the general property, one-half of certain carriages, buggies, and other specified articles, and for the sum of five hundred and thirteen dollars and sixty-six cents, against the said Wilson, being the amount found to be due complainant in the settlement of said partnership up to the time of the sale by Wilson. From this decree, complainant appeals.

W. Penn. Clarke, for the appellant.

Smith, McKinlay & Poor, for the appellees.

WRIGHT, C. J.—The record and argument of counsel, present four questions for our determination: *First*. Is the averment in the bill, that complainant and Wilson were in partnership, sustained? *Second*. If in partnership, what were the interests of the parties therein? *Third*. Was the amount decreed to complainant, correct under the proof made? *Fourth*. Should the property and effects of said partnership, be held liable for any balance found due the complainant?

The first inquiry must be answered in the affirmative. Such partnership relation is, in fact, virtually admitted in the answers, and all of the testimony taken by both parties, abundantly proves the same fact. The interest of each partner therein, is a question of more difficulty. And herein lies the prominent matter of controversy between these parties. As shown in the statement of the case, the defend-

ants answer under oath, and deny clearly and unequivocally, that complainant was an equal partner, owning one-half of the property, entitled to one-half of the profits, and liable for a like proportion of the debts; but averring that such interest and liability was one-third only. Did this question depend alone upon the preponderance of the testimony, we should hold that the complainant's claim in this respect was sustained. But giving to the answers, the force and effect to which they are entitled by the well recognized rules of chancery practice, we must conclude that the proof is insufficient. The denial as to this charge, is positive and unequivocal. This must be overcome by the testimony of two credible witnesses, or other evidence of equivalent weight and force. After carefully examining the testimony, we cannot conclude, that this has been done. It is true, that two witnesses speak of conversations between the parties, that are quite inconsistent with this denial, and tend to show that Wilson admitted on two occasions, that he and complainant were equal partners in said livery business. The full purport of such conversations, is not without ambiguity, and it is shown upon the part of the defendants, that on one occasion, complainant admitted that he was not an equal partner, and by another witness, it is shown that the interest of the complainant was but one-third. Other circumstances are developed, bearing indirectly upon the question, of about equal force on each side. Under this proof, we cannot feel justified in holding, that the positive and full denial contained in the answers, is overcome. We, of course, treat the answers in this respect as one, giving to them only the force and effect due to the answer of one defendant. We have, then, the circumstances equal, the bill, a sworn answer, full and clear in its denials, and that sustained by two witnesses, and all the witnesses, as far as disclosed, of equal credibility. Under such circumstances, the answer must prevail.

We next inquire whether the amount decreed to complainant was correct, under the proof made. And this inquiry we must answer in the negative. It appears from the master's report, that treating the parties as equal partners,

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complainant had paid into the partnership two hundred and twenty-nine dollars and seventeen cents, more than Wilson, and was entitled to that amount in his favor, as a balance over the interest of Wilson. The report also states, that besides the items allowed by him in the account stated, there were other sums claimed by Wilson, which he could not admit as proved, as no proof was offered on them. He then closes his report by stating, that if an allowance were made for the payments probably made by Wilson, calling the stock and stable equal between them, there is very little, if anything, due from the one to the other. On this report and the proof, the court below found, that if the stock and stable were owned by them equally, there was nothing due from the one to the other, but that inasmuch as complainant was found to have an interest of only one-third, he was therefore entitled to recover of Wilson, the difference between the said one-third and one-half, to wit: the sum of \$513.66. We do not think the court was justified from the proof and the master's report, in limiting complainant's recovery to this amount. In addition to this difference, the complainant should have been allowed two-thirds of the said \$229.17, the amount so overpaid by him, upon the hypothesis that they were equal partners. Adding this two-thirds to the \$513.66, we have the sum of \$666.44, as the amount due complainant. The master, in an explanatory report, states that he found this amount of \$229.17 due complainant, upon the basis that the whole property was joint, and each party entitled to the equal half thereof, and that such is the conclusion to which he arrived, from an actual examination of actual payments and receipts by them respectively, and was what he intended to state in his former report. To the original or explanatory report, no exceptions appeared to have been filed by the respondent, Wilson. *Blake v. Dorgan*, 1 G. Greene, 547. Under this state of the case, we cannot see how it can be said, there was nothing due from one to the other, upon the basis of their being equal partners. The finding of the court below in this respect, appears to have been based upon that portion of the

report which stated, that if allowance were made to Wilson for certain payments, *probably* made by him, there would be little, if anything, due from one to the other. In other words, as we understand it, such payments were allowed because they were *probably* made. We see nothing, however, to justify such an allowance, or to satisfy us that the finding and conclusion of the master was not strictly correct.

The last inquiry is, whether, for the amount found due complainant, he is entitled to a lien upon the partnership property and assets. The sale by Wilson operates, of course, to dissolve the partnership. That De Lorimier and Hannan made the purchase with notice that complainant was a partner, and had an interest in the property, part of which they purchased, we think is abundantly shown. Upon what equitable principle, then, is it claimed, that complainant should not have recourse, by specific lien, upon this property, to be reimbursed the amount advanced by him? We understand the general principle to be, that each partner has a specific lien on the partnership stock, not only for the amount of his share, but for moneys advanced by him beyond that amount, for the use of the copartnership, as also for moneys abstracted by his copartner, beyond the amount of his share. Collyer on Part. section 125, and a very full reference to the authorities in notes 1 and 2 to said section, and also, sections 126-7. The same doctrine will be found fully recognized in Story on Part. §§ 96 and 441, and in Story's Equity Jur. § 675. In section 96 of his work on Partnerships, the learned author, after speaking of the rights of the joint creditors, and of the lien which may be worked out through the partners, in favor of such creditors, proceeds to state and recognize the above rule, by saying that each partner also, has a specific lien on the present and future property of the partnership, not only for the debts and liabilities due to third persons, but also for his own amount or share of the capital, stock, funds, and for all moneys advanced by him for the use of the firm. This right or lien is, of course, subordinate to the right of the joint creditors, to be first paid from the partnership capital, funds, or stock. And

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it is a little remarkable, that in the whole record, there is nothing said with reference to the rights of such creditors. We can only presume that none existed. If there were such, an account should have been taken of the outstanding liabilities, in order to properly settle the partnership. And in any order that may be made, recognizing and giving to the complainant a lien for the amount so found to be due him, the rights of the joint creditors can, of course, be in no manner affected. The appropriate method is, by the final decree, to order a sale of the partnership property, the proceeds of which, after the payment of expenses and the joint debts, is to be distributed among the partners, according to their respective interests, having reference to advances made by either one, over and above his proper share or interest. And this must be the order in this case, in the absence of agreement to the contrary; for we do not regard that the purchase by De Lorimier and Hannan, can change the rule, they having purchased with notice. Indeed, the fact of their purchase, renders such sale the more necessary, it being conceded that the former partnership was thereby dissolved. The rights of the complainant and such purchasers, arising subsequent to the sale by Wilson, appears not to have been in litigation, and with them we have nothing to do. It is claimed, however, by respondents, that it does not appear that this claim for a specific lien was made or urged in the court below. But it must be borne in mind, that this is an appeal in chancery, and in this court, the facts as well as the law of the case, are again reviewed and re-adjudicated. *Stockwell v. David*, 1 G. Greene, 115. Upon an examination of the whole case, this court will render such a decree as should have been entered in the first instance, consistent with the case made by the bill and sustained by the proof. This bill prays for such lien; and we see no equitable rights of the respondents which will be infringed by granting the prayer.

The decree will therefore be so far modified, as to allow complainant \$666.44, with interest, instead of \$513.66, and that the same be a specific lien on the property belonging to said partnership, and in all other respects it is affirmed.

THE CHRISTIAN CHURCH AT PELLA v. SCHOLTE.

The character of a proceeding—whether at law or in equity—is to be determined by the prayer and conclusion of the petition.

Where a petition claims that the plaintiff has a valid, subsisting interest in the property described in the petition; that he has a right to the immediate possession thereof, and to the ownership in fee simple; and prays that he may recover the immediate possession thereof, with damages for the detention of the property, the proceeding is at law, and not in equity.

Where S. being the owner of certain real estate, laid out the town of Pella, caused a plot or map to be made and certified, and on the 5th of June, 1848, acknowledged it, and caused it to be recorded, under the act of January 29, 1839—on the plot of which, certain squares were denominated, East Market square, West Market square, Garden square, and Church square; and where the plaintiff brought an action to recover the possession of the piece of ground denominated Church square, alleging in the petition, that the defendant caused this parcel of ground to be marked Church square, thereby dedicating and granting it to said Christian church at Pella; that on the 5th of June, 1848, there existed an association or organization of the members of said church at the said town of Pella, and avers an incorporation on the 2d of December, 1849; that said church had a valid, subsisting interest in the property; that it had a right to the immediate possession thereof, and to the ownership in fee simple; and praying that plaintiff may recover the immediate possession of the said square, and one hundred dollars' damages for the detention thereof; *Held*, That the plaintiff had no legal title, of any kind, to the premises, nor any exclusive right therein.

Whether dedications for church purposes, and especially those to charitable purposes, require a trustee, *quere?*

Whether the grantor can revoke such dedications, *quere?*

Whether the trust is not in the body corporate, for execution, *quere?*

Where a lot of ground is dedicated to church purposes generally, whether any one church has a right in the property dedicated, until such right is appointed to them by the proper person or body, *quere?*

Appeal from the Marion District Court.

THIS suit was commenced by the Christian church at Pella, against Henry P. Scholte, on the 30th of August, 1854. A demurrer to the petition was sustained, and the suit dismissed. The plaintiff appeals, and assigns for error, the sustaining of the demurrer, and the dismissal of the suit. The facts of the case, are stated in the opinion of the court.

J. E. Neal, for the appellant.

Knapp & Caldwell, for the appellee.

WOODWARD, J.(1)—The appellee, being the owner of the land on which the town of Pella, in Marion county, is situate, laid the same out into a town, caused a plot or map to be made and certified, and on the fifth of June, 1848, acknowledged it, and caused it to be recorded under the act of January, 1839. Rev. Stat. 608. On this plot, certain squares were marked or denominated respectively thus: East Market square, West Market square, Garden square, and *Church square*. The latter consisted of a portion, only, of one of the usual squares or blocks of the town, it being about one-fourth of it. The plaintiff alleges, that the defendant has taken possession of this square, and that he has permitted one Huntsman to take possession of part of the same, who is building a dwelling-house thereon.

The petition avers, that the defendant caused this parcel to be marked Church square, "*thereby dedicating and granting it to the said Christian church at Pella.*" And, again: it avers, that he granted and dedicated to the said Christian church, "a certain parcel of land, known and designated as 'Church square,' on the plot of the said town of Pella, by setting apart and designating said parcel of land as Church square, on the plot of said town." The petition further alleges, that on the 5th of June, 1848, there existed an association, or organization, of the members of the said Christian church, at said town of Pella, and avers an *incorporation* on the 2d December, 1849. The defendant demurs to the petition. It may lead to brevity, to look first at the fourth cause of demurrer, which is: that there is no showing that the pretended grant, or dedication, was made to the plaintiffs. The petition avers this to have been done by the designation of the parcel, as *Church square*. The case rests

(1) WRIGHT, C. J., having been of counsel, took no part in the decision of this ~~cause~~.

on the statute of 1839, before cited. The designation on the map is *general*; it may apply to one church or another, or to church purposes generally. But what is there, to apply it to *this particular church*? It is true, that was the only one there; but we cannot, for this reason, say that the donor intended to exclude a Presbyterian, or Methodist, or other church, which might arise. There is no doubt but that a donor might thus grant to a *specific* body, but he has not in this case. When the precise object of the dedication is not defined, but the design is yet for the public use, according to its nature, the above act, in section 5, seems to mean that it shall be held in the *corporate name*, in trust for the purposes intended.

The question now arises, is the plaintiff's petition in law, or in equity? This is to be determined by the prayer and conclusion. They say they have a valid, subsisting interest in the property; that they have a right to the immediate possession thereof, and to the ownership in fee simple; and they pray, that they may receive the immediate possession of the said square, and one hundred dollars damages, for the detention thereof. Now, this is an action *at law*, and we have seen that the plaintiffs have not a *legal title*; and neither have they, as yet, an *exclusive* right of any kind. How, then, can they recover? The demurrer must prevail, which avers that there is no showing that the dedication was to the plaintiffs, for the petition does not assert absolutely, but avers that it was granted them, by *thus designating it* on the plot, whilst the legal conclusion from this designation, contradicts their *inference*, that it was dedicated *to them*.

The plaintiffs cannot recover in this action, and this is all we are called upon, by the case, to decide.

It is desired that we should go further, and consider other questions which arise; but the questions are of too grave a nature for extra-judicial decision. Two or three queries may, however, be suggested, which may save the parties much trouble and litigation; as, whether such dedications, and especially those to charitable purposes, require

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a grantee? whether the grantor can revoke such dedications? whether the trust is not in the body corporate for execution? whether any one church has a *right* in the property dedicated, until such right is appointed to them, by the proper person or body? See authorities cited by plaintiffs' counsel: 6 Pet. 435; 2 Strange, 2004; 2 Ib. 256, 565; 6 Ham. 129; 1 How. (Miss.) 380; 10 Ib. 712; 12 Georgia, 239; *The Town of Pawlet v. Clark et al.*, 9 Cranch, 292; *McConnell v. The Trustees of the Town of Lexington*, 2 Wheat. 582; *The Trustees of the Philadelphia Baptist Association et al. v. Hart's Executors*, 4 Wheat. 1.

The judgment of the District Court will be affirmed, and the petition is dismissed.

McGREGOR, LAWS & BLACKMORE v. ARMILL.

Where, in an action on a note, the jury returned a verdict as follows: "The jury, in the above case, find for the plaintiff the amount of the note and interest," and the court thereupon directed the clerk to assess the damages, and rendered judgment for the sum so assessed; *Held*, That the verdict was sufficiently certain, and that the court did not err in directing the assessment by the clerk, and rendering judgment against the defendant for the sum so assessed.

An objection not raised in the court below, cannot avail the party in the appellate court.

The giving or refusing an instruction upon a mere abstract proposition of law, which does not refer in any way to the evidence of the case, or issues made, is not such an error as will warrant a reversal of the judgment, unless it may be fairly inferred that the jury was thereby misled, to the prejudice of the party complaining.

Where in an action on a note, the signature to which was denied under oath, upon which issue was taken, the defendant, to sustain the issue upon his part, produced four witnesses, who testified that they had seen him write recently within a year or two, and they were of opinion that the signature to the note was not the handwriting of the defendant, three of which witnesses were experts; and the genuine handwriting of the defendant being shown them, they gave their opinion as experts, from their knowledge of his handwriting; and where, there being no evidence of any witness that had seen the defendant sign the note, the court instructed the jury, that "the evidence of experts, who are not acquainted with the signature or

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handwriting of the person whose signature is in dispute, is the lowest and least satisfactory kind of evidence as to the genuineness of handwriting:" *Held*, That there was no evidence to justify the court in giving the instruction, and that it was fairly inferable that the instruction misled the jury, under the circumstances disclosed, to the prejudice of the defendant.

Appeal from the Scott District Court.

THIS was an action to recover on a promissory note, due in ninety days after its date. The execution of the note was denied under oath, and on this issue was taken by proper replication. To sustain the issue on his part, the defendant (in the language of the bill of exceptions) "produced four witnesses, who testified that they had seen him write recently, within a year or two, and they were of opinion that the signature to the note was not the handwriting of the defendant. There was no evidence by any witness, that they had seen the defendant sign the note. Three of the witnesses for the defendant, who stated that in their opinion the signature was not genuine, were experts, and the genuine handwriting of the defendant was shown them, and they gave their opinions, as experts, from their knowledge of his handwriting." At the request of plaintiff, the court charged the jury, that "the evidence of experts, who are not acquainted with the signature or handwriting of the person whose signature is in dispute, is the lowest and least satisfactory kind of evidence as to the genuineness of handwriting," to which defendant excepted. After stating the names of the parties, the verdict of the jury was as follows: "The jury, in the above case, find for the plaintiffs the amount of the note and interest," which was signed by their foreman. The court, thereupon, ordered the clerk to assess the damages, and he having accordingly returned, that there was due on the note \$632.20, judgment was rendered for that amount. So far as the record discloses, the defendant did not at the time object to such assessment, or the form of the verdict.

Whitaker & Grant, for the appellant.

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G. C. R. Mitchell, for the appellees.

WRIGHT, C. J.—It is first assigned for error, that the court had no right to refer the assessment of damages to the clerk, and that there was no sufficient verdict upon which a judgment could be rendered. But can defendant take advantage of this, at this time? We think not. If the form of the verdict was defective, it might have been corrected at the time of its rendition, had the defendant objected, and thus have obviated the necessity of referring the assessment to the clerk. We think the objection must have been taken in the court below, to avail the party in the appellate court. *Schlenker v. Risley*, 3 Scam. 488; *Bank of Illinois v. Batty*, 4 Ib. 200.

Aside from this, however, we think the court committed no error in directing the assessment and rendering the judgment for the amount. The action was upon a note, clear and definite as to the date, maturity, and interest. The only issue was the execution or non-execution of the note. To this issue, the jury, by the verdict, did respond. The party in whose favor they found, is also distinctly stated. And they also do, for all practical purposes, assess the damages. There is no difficulty in arriving at absolute certainty, from such a verdict. The mind can have no hesitation in saying, that the intention of the jury is expressed, and so expressed, that but one judgment could be rendered, and that for an amount definitely ascertained from data which had been found by the jury. The form is sufficient, if it expresses the intention of the jury. Code, § 1720. We do not then treat the assessment as made by the clerk, but by the jury. The verdict might have been more formal, but could scarcely be more certain. Had the pleadings been otherwise; had there been other and different issues, or the cause of action other than a promissory note, there might be more room for doubt. In this case, however, there is no pretence that the judgment was for anything beyond the amount of the note and interest, which was what the jury found and reported, in legal effect; and for such want of form, we would not

disturb the case, even if objection had been made at the proper time. Upon this subject, see *Beckwith v. Carleton*, 14 Geo. 691; *James v. Wilson*, 7 Texas, 230; *Wells v. Barnett*, Ib. 584; *Smith v. Johnson*, 8 Texas, 418; *Findley v. Buchanan*, 1 Blackf. 12; *Heddy v. Fullen*, Ib. 51.

It is next urged, that the court erred in giving the instruction asked by plaintiff, and this presents a question of more difficulty. The appellant claims that it was erroneous, because there was no evidence to justify the court in giving such instruction; that the evidence shows, that the experts who testified, had a personal knowledge of the handwriting, and swore as well from such knowledge, as from mere comparison; and that, therefore, the instruction, if correct, was predicated upon an improper basis, and was calculated to mislead and confuse the jury. The appellees, on the other hand, admit that the instruction had no application under the proof made, but that the jury could not have been misled by it, and therefore, if erroneous, which is denied, it cannot operate to reverse the case.

It may be regarded as settled, that the giving or refusing an instruction, upon a mere abstract proposition of law, which does not refer in any way to the evidence in the case, or issues made, would not be such an error, as will warrant a reversal, unless it may be fairly inferred, that the jury was thereby misled to the prejudice of the party complaining. If it was erroneous, but could have had no effect upon the finding, it would be no ground for error in this court. It is also true, that the instructions should apply to the facts proved, but if they have no such application, and could have no influence on the verdict, though erroneous, they will afford no ground for a reversal of the judgment. *Horner et al. v. Wood et al.*, 16 Barb. 386; *Atkinson v. Lester*, 1 Scam. 407; *United States v. Wright*, 1 McLean, 509; *Smith v. Carr*, 16 Conn. 450; *Cummings v. Chandler*, 26 Maine, 453. The giving of an instruction, involving a mere abstract, legal proposition, may not aid the jury, nor does it necessarily follow that it had an improper influence. But if erroneous,

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and it appears that it could have had an influence prejudicial to the interests of the excepting party, this court will be justified in reversing it. *Corbin v. Shearer*, 3 Gilm. 482; *Carson v. Lucore*, 1 G. Greene, 33. And in the case of *Benham v. Cary*, 11 Wend. 83, it was held, that where the charge of the court had a tendency to make an erroneous impression upon a jury, and mislead them in their views of the case, a new trial should be granted.

In view of these general propositions, let us examine the question presented. It is very evident, that the instruction given, was not applicable to the facts proved. The witnesses gave their opinion, as experts, *from their knowledge of the handwriting* of defendant, and not from a mere comparison of writings or signatures, of which they had previously known nothing. That such testimony is entitled to more weight, than if the witness had spoken alone from comparison, is recognized by the instruction, and must be admitted. If it be true, then, that the evidence of experts, unacquainted with the signature, is the lowest and least satisfactory kind of evidence, as to the genuineness of the disputed signature, it is fairly inferable, that the giving of such instruction would mislead the jury, under the circumstances disclosed. And we conclude, that it would have such an influence. Here was a controversy as to the genuineness of a signature to a promissory note. The record shows, that witnesses were introduced, part of whom testified, that from their knowledge of defendant's handwriting, they believed it to be genuine. Others, again, from a like knowledge, were of the opinion that it was not his signature. Some of these latter witnesses were experts, and the genuine handwriting being shown them, they gave their opinions, as such experts, from their knowledge of defendant's handwriting. On this proof, the jury are informed, that the evidence of experts, who are not acquainted with the handwriting, is the lowest and least satisfactory kind of evidence. Now, we certainly hazard nothing in saying, that jurors, upon a question which has elicited conflicting opinions, from the highest tribunals, might well be misled by such an

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instruction, and must almost necessarily, have treated the testimony actually given, of the lowest kind. If so, the defendant must as necessarily have been prejudiced.

We conclude, then, that the instruction was inapplicable, was calculated to mislead the jury and prejudice defendant's interests, and should, therefore, have been refused.

It, therefore, becomes unnecessary to inquire into the correctness of the instruction given, under a state of case, where the question might properly arise.

Judgment reversed.

STONE v. MURPHY.

In suits before justices of the peace, the amount claimed is the criterion of jurisdiction, and not the amount that may appear to be due or owing on the instrument declared upon.

The pleadings before a justice of the peace, may be written or oral; and when oral, they must, in substance, be entered by the justice on his docket. But, in no case, is it necessary that the justice should set the same out with the particularity required in a formal petition. He is to give the substance of what the plaintiff claims, and more than this is not required.

In an action on a penal bond, before a justice of the peace, no petition is necessary; nor is it necessary that the docket entry of the justice, should show and specify the breaches of the bond, of which the plaintiff complains.

Where an original notice informed the defendants, that the plaintiff claimed "one hundred dollars, as justly due him on attorney's lien, secured by bond, made by you (defendants), December 30th, 1854, and filed in the district clerk's office of" &c., which statement was substantially entered by the justice on his docket: *Held*, That a statement of the plaintiff's cause of action was sufficiently stated on the docket of the justice.

The averments in the affidavit for a writ of error to remove proceedings from before a justice of the peace, amount to nothing, unless there is a response to the same in the return of the justice.

Where in an action on a penal bond to secure the payment of attorney fees, the plaintiff, at the time of commencing his suit, deposited the bond, together with a bill of items of the services rendered, with the justice, which bond the justice failed to mark filed; and where on the day set for the trial, one of the defendants appeared, and moved to dismiss the cause, because the plaintiff's bill of items did not charge any indebtedness against him, and the plaintiff thereupon withdrew his bill of items, and made affidavit that he

2	85
112	516
2	85
127	508
2	85
133	551

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supposed that said bond had been filed, and was in the hands of the justice, until at the time set for trial, he was informed by the justice, that he had not filed the same, and asked leave to proceed on the oral pleadings, which leave was granted, and thereupon the defendant withdrew, and made no further defence; *Held*, 1. That the failure of the justice to mark the bond filed, could not prejudice the rights of the plaintiff; and that if such previous filing had been overlooked, and it became necessary to indorse the bond as filed, it was not only the right, but the duty, of the justice, to make such indorsement *nunc pro tunc*. 2. That the plaintiff did right in filing his account with the bond, and if the justice, by his ruling, on the defendant's motion, committed an error against the plaintiff, the defendant cannot complain.

Appeal from the Pottawatomie District Court.

It appears that Stone had a claim against one McNulty, for one hundred dollars, for professional services rendered as an attorney. To secure this, the said McNulty gave Stone a bond, in the penalty of three hundred dollars, with the defendant and another, as his sureties. The plaintiff sued upon this bond before a justice of the peace, claiming one hundred dollars. None of the defendants were served, except the said Murphy. While the justice's transcript is not very clear, in this respect, yet it sufficiently appears, that Stone filed with the justice a bill of items, setting forth the services for which the said McNulty was liable, and also deposited with the justice the bond aforesaid, but the justice failed to indorse the same as filed. On the day of trial, the defendant appeared, and moved to dismiss the cause, because the plaintiff's bill of items did not charge any indebtedness against him, which motion was entertained (to use the language of the transcript), and the plaintiff thereupon withdrew his bill of items, and made affidavit that he supposed that the said bond had been filed, and was in the hands of the justice, until at the time set for trial, he was informed by the justice, that he had not filed the same; and asked leave to proceed on the oral pleadings, which was granted. Defendant thereupon withdrew, and made no farther defence. A trial being had, the plaintiff obtained judgment for the amount of his claim. The defendant made affidavit, and

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removed the proceedings into the District Court by writ of error. To the several allegations contained in the affidavit, the justice made returns as above stated. On the hearing in the District Court, the judgment of the justice was reversed, and the cause remanded. This order is now assigned for error by the appellant.

W. Penn. Clarke, for the appellant.

WRIGHT, C. J.—The first error complained of by the defendant, in his affidavit, which was the basis of the proceeding for the writ of error, was, that the suit being on a bond for three hundred dollars, the justice had no jurisdiction. The plaintiff claimed, however, only one hundred dollars. The amount claimed is the criterion of jurisdiction, and not the amount that may appear to be due or owing on the instrument declared upon.

Again: the affidavit alleges, that there was no breach of the conditions of the bond averred by plaintiff, and that none of the conditions had been violated. By the Code, the pleadings before a justice of the peace, may be written or oral, and when oral, they must, in substance, be entered by the justice in his docket. But, in no case, is it necessary, that the justice should set the same out with the particularity required in a formal petition. He is to give the substance of what the plaintiff claims, and more than this is not required. In this case, the notice specifically informed the defendants that plaintiff claimed "one hundred dollars as justly due him on attorney's lien, secured by bond, made by you (defendants), Dec. 30, 1854, and filed in the district clerk's office of," &c. The justice's transcript shows that this was substantially entered by him on his docket, as the plaintiff's cause of action. We do not think it was necessary that such entry of the justice, should show and specify the breaches of which plaintiff complained. No petition was necessary; but the notice is required to state the cause of action in general terms, so as to apprise the defendant of the nature of the claim against him. Code, § 2272. This was

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done most clearly in this case. So far as relates to the averment, that none of the conditions of the bond had been violated, it is sufficient to say, that no return was made by the justice to this alleged error; and to such return we must refer, in determining whether there was such error in his records and proceedings. The averment in the affidavit, amounts to nothing, unless there is a response to the same in the justice's return.

In the third place, it was averred, that the bond upon which suit was founded, was not filed until after the commencement of the trial, and that no claim was filed showing that plaintiff was entitled to recover on the bond. It would seem, that when the plaintiff commenced his action, he deposited with the justice the bond, as also a bill of items, specifying the services referred to in said bond. The justice, however, failed to mark said bond as filed. This failure could not prejudice the rights of the plaintiff, for if, in truth, deposited with the justice as the foundation of the cause of action, and in his office as such, it could make no difference that he had failed to write upon it the date of such deposit. And if such previous filing had been overlooked, and it became necessary to indorse it, it was not only the right, but the duty, of the justice, to make such indorsement, *nunc pro tunc*, when such omission was brought to his attention. It is true, that it appears that plaintiff for some cause, withdrew his bill of items, and had leave to proceed on his oral pleadings. This was something that he need not have done, but having done it, we cannot see how the defendant could take advantage of it. The bond sufficiently showed defendant's liability, and that was in legal effect a part of the papers and proceedings, so far as disclosed in this record. The proof made after the defendant's withdrawal, is not stated, and we must presume that it was sufficient to justify the judgment.

The fourth and last error stated in the affidavit, relates to the withdrawal of said bill of items, and the leave given to the plaintiff, by the justice, to proceed upon said bond. This has been already sufficiently noticed, in what we have said as to the third cause. We may say this, however, in addi-

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tion, that by the bond, the defendant was liable to Stone, for whatever might be due him for the legal services thereby secured. While it is not clear, yet we infer from the record, that the bill of items filed was against the principal alone, and not against the principal, and his sureties. The defendant moved to dismiss, because the bill of items did not charge anything against him. It appears that the justice "entertained" the motion, (but whether it was sustained, is not stated, unless that is what the justice meant by saying he entertained it); and thereupon plaintiff relied upon the bond and oral pleadings. The plaintiff did right in filing his account, with the bond, and if the justice, by his ruling on the defendant's motion, committed an error against plaintiff, defendant cannot complain.

We conclude, therefore, that there was no such error in this proceeding, as to justify the District Court in reversing the judgment of the justice. Cause remanded, with instructions to render judgment in accordance with this opinion.

TOMLINSON v. SMITH *et al.*

In an agreement for the sale of land, which provides as follows: "But should the taxes, and the note above described, not be paid by the time they become due, then I reserve the right to sell the above-described land at any time thereafter, to any person or persons," time is of the essence of the contract.

Where a bill in chancery to enforce the specific performance of a contract to convey land, in which time was of the essence of the contract, alleged that the respondent had waived the performance of the contract as to time, and set up a contract as follows: "In April, 1854, in a conversation had at Bellevue, your orator informed said W. (the agent of respondent), that your orator had become the assignee of said B. (with whom the contract was made), in the contract aforesaid, and said W. agreed to wait on your orator for several months for payment of said note (the note given for the price of the land), and that he would convey the said land to your orator, on payment of said note and interest, providing that all the taxes were paid," as evidence of the waiver; and where the bill alleged further, that the com-

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plainant had paid all the taxes on the land; *Held*, That the subsequent contract alleged, was without mutuality or consideration, and was not sufficient to revive, and extend the time, on the original contract.

Appeal from the Dubuque District Court.

THIS is a bill in chancery to enforce the specific performance of a contract to convey real estate, commenced by Tomlinson against Smith and others. The bill, in substance, shows that Wilson, being the agent of Fain and Branner, for the sale of land warrants, on the 23d of June, 1851, in their behalf, entered into an agreement with one Blancet, to locate the lands described in the bill, in their names, and took the note of Blancet, payable to said Fain and Branner, for two hundred and twenty dollars, in one year; and on their part, Wilson, as such agent, executed a writing, describing said note, and stipulated, that if the note should be paid, on or "before the time it became due, and the taxes arising on the land shall be paid," to convey the land to Blancet, which writing contained a concluding clause, as follows: "But should the taxes and note above described, not be paid by the time they become due, then I reserve the right to sell the above-described land at any time thereafter, to any person or persons." This agreement was assigned by Blancet to one Cargrave, in October, 1851, and he, in March, 1852, assigned the same to plaintiff.

It is alleged, that in April, 1854, in a conversation had between complainant and said Wilson at Bellevue, complainant informed said Wilson, that he had become the assignee of said Blancet in the contract as aforesaid, and said Wilson agreed to wait on complainant for several months for payment of said note, and that he would convey the said land to complainant, on payment of said note and interest, providing that all the taxes were paid. Complainant avers that he paid all the taxes on the lands; that Wilson had full power to give the extension, and did give the same, as agent for Fain and Branner; that Thomas Smith, who well knew that complainant had become the purchaser of said land,

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and assignee of said Blancet, intending to wrong complainant, on the eleventh day of May, 1854, applied at the office of Wilson, and represented that Blancet had gone to California, and that he, the said Smith, wished to purchase the land, and that there was nobody who claimed the said land, but did not state that complainant had become the assignee of Blancet, though such fact was well known to said Smith; and that Wilson having temporarily forgotten the conversation between him and complainant, sold the land to Smith, who bought with notice that complainant had equities in the said land: That on the 12th July, 1854, complainant tendered to Smith the amount paid by him for the land, with a deed for him to execute; that Smith declined the money, and refused to execute the deed; that the lands have greatly risen in value; and that part of the lands have passed into the hands of innocent purchasers. Several defendants are made to the bill, and complainant prays that the sale to Smith may be decreed fraudulent on his part; that an inquiry may be had as to what portions of said lands have passed to innocent purchasers; that Smith be compelled to convey the residue to complainant, and pay over the money received for the parts sold. The amount paid by Smith for the land, is brought into court, and tendered by the bill. To this bill, the respondents demurred, on the ground, among others, that it contained no equity, which demurrer was sustained, and the bill dismissed. The complainant appeals, and assigns the sustaining of the demurrer as error.

Smith, McKinlay & Poor, for the appellant.

Ben. M. Samuels, for the appellees.

ISELL, J.—In considering this case, we shall regard the last point made by the demurrer only, which is “there is no equity in complainant’s bill.” Though other parties are made to the bill, relief is prayed against Smith alone. The original agreement, which is at the foundation of this case, was made between Blancet, of whom the complainant is as-

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signee, and Fain and Branner, grantors of Smith. This agreement is substantially on the part of Blancet, that he will pay, on or before a year from the 23d of June, 1851, to Fain and Branner, the sum of two hundred and twenty dollars (for which he gave his note), and all taxes on the land in controversy. On the part of Fain and Branner, it is agreed that if he does so, he shall have a deed for the land, on request. But a reservation is made in the agreement, that if he does not pay the taxes and note, by the time they become due, they shall have "the right to sell the land at any time thereafter, to any person or persons." That time was of the essence of this contract, and so understood to be by the original contracting parties, and by the complainant, who attempts to set up that he has stipulated for an extension of time on the same, from the express stipulation of the agreement itself, there is no room to doubt.

There is nothing apparent in the bill, to show that Blancet was ever in possession of the land, or that prior to its purchase from the government, he had any claim upon, or interest in it. There is, then, nothing to give this contract anything of the character of a mortgage. We must regard it, as what it clearly purports to be on its face, a conditional covenant to convey. The record discloses nothing whereby it appears, that from the time the note fell due in June, 1852, up to April, 1854, complainant had in any way evinced an intention to comply on the part of Blancet, by paying the note, and though during all this time, he had been the assignee of Blancet, it does not even appear that Fain and Branner had notice of this fact. Fain and Branner, by the terms of the contract, had a right to sell to any persons or persons, notwithstanding the note of Blancet was still in their hands, after it became due, it remaining unpaid. *Notson v. Barret*, 1 G. Greene, 303. What effect a sale would have upon the right to recover upon this note, is another question, and one not stipulated for in the contract.

Complainant having thus lain by, without evincing any intention to take the land, or in any manner becoming bound to discharge the contract on the part of Blancet, until the land

had risen in value, and he perhaps beyond the reach of process, leaves complainant in no condition to be the peculiar favorite of a court of equity. See the remarks of Kent, Chancellor, in *Benedict v. Lynch*, 1 John. Ch. 375, and grounds of special performance reviewed and case cited.

The right that Fain and Branner had to sell the land, after the note fell due, continued, unless by some act on their part, they divested themselves of that right.

It is claimed they have done this. This leads us to consider the pretended agreement with Wilson, whereby it is claimed this contract was revived, and the time extended on the same. This is stated in the following language: "In April, 1854, in a conversation had between your orator and said Wilson, at Bellevue, your orator informed said David S. Wilson, that your orator had become the assignee of said Blancet, in the contract as aforesaid, and said Wilson agreed to wait on your orator for several months for payment of said note, and that he would convey the said land to your orator, on payment of said note and interest, providing that all the taxes were paid.* And your orator charges that he paid all the taxes on the said lands." Does this show a *valid, binding* agreement to revive the contract and extend the time for its performance? We think not. In the first place, there is no mutuality. Complainant was not bound to pay the note of Blancet, nor does he, by anything here shown, become bound. Again, there appears no consideration whatever for this agreement. The only plausible pretext for one, is that complainant, *in faith of the promise* of Wilson, has been induced to pay taxes which he would otherwise not have paid. But while it might so appear at first view, still it is not so stated in the bill. True, the bill charges that complainant has paid all the taxes on said land, but not that he has paid in pursuance of the agreement, and from anything the bill shows, these taxes may have been paid before the conversations with Wilson, or after the sale to Smith.

We think this contract or agreement with Wilson, as stated, is without mutuality, or consideration, and was not sufficient to revive and extend the time on the original contract; and,

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that, therefore, Fain and Branner had a right to sell at the time they sold to Smith, and, of consequence, Smith had a right to buy.

The demurrer will therefore be sustained, and the bill dismissed.

THOMPSON v. BLANCHARD.

A party objecting to the admission of evidence, should show by his exceptions, the ground of objection to the evidence admitted.

The appellate court cannot pass upon any objections to evidence, not insisted upon at the trial below.

In cases of arbitration, the Code gives the parties the power to agree upon the rules that are to govern the arbitrators.

And where in an action on an award, the admission of the award in evidence was objected to, on the ground that it was not signed by all the arbitrators, and it appeared that the agreement of submission provided, that the award of a majority should be as binding, as if made by the entire number; *Held*, That this was one of the rules which the parties had prescribed in the settlement; and that, therefore, if, independent of such agreement, the award was legally defective (which is not conceded), the objection was not well taken.

Where an action was brought on an award, on which there was a credit of \$283.20, and the plaintiff in his petition stated, that \$67 of the credit so indorsed, was a mistake; that upon the agreement of defendant, that plaintiff should have a certain lot of lumber to that amount, he consented to give him the credit, but that defendant had refused to let him have the lumber—had appropriated the same to his own use—and that the credit was, therefore, to that amount incorrect, which averments were not denied by the answer; and where the court instructed the jury, "that they were not bound to take into consideration any credit indorsed on the award, if the defendant has failed to prove the same;" *Held*, That the averments in the petition in relation to the mistake in the credit, not being denied, were to be taken as admitted, and with reference thereto, the instruction was not erroneous; and that as to the balance of the credit, the instruction was erroneous, but that, as it appeared from the record, that the jury allowed the balance of the credit in making up their verdict, no prejudice had resulted to the defendant.

Generally, a defendant is not bound to prove the correctness of a credit, indorsed upon the cause of action.

The Supreme Court will not reverse a cause, where an erroneous instruction has been given, if it appears that the party complaining suffered no injury therefrom.

Where in an action on an award in relation to certain services rendered by

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plaintiff in and about a steam mill, as well as the private accounts of the parties, which was resisted on the ground of errors and mistakes, the defendant introduced one of the arbitrators, and proposed to prove that at the time of the hearing before the arbitrators, there was no testimony introduced to show what were the net profits of the mill; and also, that at the same hearing, the plaintiff produced a certain book, in which he had kept his account of sales of lumber at said mill, which book was handed to one of the arbitrators, but that it was not examined by them after they had retired to make up their award, which testimony was rejected by the court; *Held*, That the evidence was admissible.

Where matters are considered by arbitrators which were not submitted—where they have committed such material errors or mistakes as prejudice either party—or where they omit to consider matters which were submitted—for these, and other causes, as well as for fraud, the award may be rejected by the court to which it is returned, or impeached when an action is brought to enforce it.

The whole burden of proof is on the party who attacks an award; it is for him to clearly satisfy the jury of any mistake, as also, that he was prejudiced thereby.

Unless some material error or defect is apparent on the face of an award, it cannot be avoided, unless the other errors or defects complained of, are shown fully and clearly.

Appeal from the Fremont District Court.

THESE parties submitted certain matters in controversy between them, to arbitrators. They having heard the cause, awarded the sum of \$388.14 to plaintiff, which award was in writing, but was not returned or delivered to any court. The defendant having failed to pay the whole amount so awarded, plaintiff brought this suit to recover the balance. Upon the back of the award, at the time of bringing suit, there was a credit of \$283.20, dated February 10, 1853. Defendant answered, denying the indebtedness, admitting the submission and award, setting up, however, that the arbitrators committed gross errors and mistakes, in making up their said award; that the matters submitted, arose out of certain services rendered by plaintiff, in and about a certain steam mill, as well as the private accounts of the parties; and that such gross errors and mistakes were occasioned by the arbitrators taking into consideration, and assuming without evidence, that the mill sawed two thousand feet of lumber each day, during the time for which plaintiff

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claimed one-half of the profits. The answer also avers, that at the hearing before the arbitrators, the plaintiff, by fraud, suppressed a certain account of lumber, which plaintiff had received, during the time that plaintiff had charge of it, and was entitled to the one-half of the profits, and which account defendant supposed was produced; and that the arbitrators, after their retirement, took into consideration other evidence, without defendant's knowledge, and to his prejudice. All of these allegations, were denied in the replication. Other issues were raised by other portions of the answer, replications, and subsequent pleadings; but as they do not become material in the decision of the case, they are not set out. Plaintiff offered in evidence the award, on the introduction of which, defendant objected, which was overruled, but the ground of objection does not appear. In the further progress of the trial, the defendant introduced one of the arbitrators, and proposed to prove, that at the time of the hearing before the arbitrators, there was no testimony introduced, to show what were the net profits of the mill; and also that, at the same hearing, the plaintiff produced a certain book, in which he had kept his account of sales of lumber at the said mill, which book was handed to one of the arbitrators, but that it was not examined by them, after they had retired to make up their award, which testimony being objected to, was rejected by the court. At the request of plaintiff, the court instructed the jury, that if they believed from the evidence that the award was fairly obtained, they would find for the plaintiff the amount due; and that they were not bound to take into consideration, any credit indorsed thereon, if the defendant had failed to prove the same, to which defendant excepted. The defendant asked the following instructions: That if the arbitrators in making up their award, took into consideration anything that was not embraced in the agreement, and proved by the parties, then they have acted in violation of law, and the award is not binding, and plaintiff cannot recover, which was refused, for the reason, as the bill of exception states, that it had been given in substance in the third in-

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struction asked by defendant. What this third instruction was, is not disclosed. Judgment being rendered for plaintiff in the sum of \$172.80, defendant appeals.

C. E. Stone, for the appellant.

W. Penn. Clarke, for the appellee.

WRIGHT, C. J.—The first error assigned, is the decision of the court in allowing the award to be read to the jury as evidence. It does not appear what objection was made to the introduction of this paper in the court below, and for this reason, we are justified in sustaining the ruling there made. The party should show, by his exceptions, what was the objection urged, and decided in the District Court. This court cannot pass upon objections, not insisted upon in the trial below. Any other rule, would be unjust and dangerous in the extreme. It is insisted here, however, that the award should have been rejected, because it was not signed by all of the arbitrators, and this objection, we will notice. The Code gives the parties, in making these amicable settlements, the power to agree upon the rules that shall govern the arbitrators. Section 2103. It appears from the agreement of submission, that the matters in controversy, were submitted to seven persons, and their award, or that of a majority, was to be a final settlement between the parties. The award offered, was signed by five of the arbitrators. The parties then agreed, that the award of the majority should be as binding, as if made by the entire number. This was one of the rules which they, by their agreement, prescribed in this settlement. And therefore, if independent of such agreement, such award would be legally defective (which is not conceded), in this instance, the objection cannot prevail. The defendant made his own terms and rules, in this respect, and by them he must be governed.

It is next urged, that the court erred in giving the instructions asked by plaintiff, in relation to the credit indorsed on the award. To determine this, it becomes necessary to refer

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to a portion of the pleadings. In his petition, the plaintiff avers, that \$67 of the credit so indorsed, was a mistake; that upon the agreement of defendant, that plaintiff should have a certain lot of lumber to that amount, he consented to give him the credit; but that defendant had refused to let him have the lumber, but had appropriated the same to his own use; and that the credit was therefore to that amount, incorrect. This averment is not denied by the answer, nor is any reason given for not denying it, and is therefore to be taken as true. Code, § 1742. The credit, then, to this extent stands admitted to be a mistake. The jury were bound to disregard it, in making up their verdict, and with reference thereto, the instruction was not erroneous. But for this, the instruction would have been clearly erroneous; for generally, a defendant is not bound to prove the correctness of a credit that is so indorsed. But it is claimed, that the instruction is general, and by its language includes the entire credits. And so it does; but as it is evident from the record, that the jury allowed the balance of said credits, in making up their verdict, no prejudice resulted. This court will not reverse a cause, when an erroneous instruction has been given, if it appears that the party complaining suffered no injury therefrom.

The third error assigned, relates to the rejection of the testimony proposed to be elicited from one of the arbitrators. It appears that defendant resisted the award, for the reason, among others, that errors and mistakes had been made by the arbitrators, which consisted, in part, in their assuming without evidence, that the mill sawed two thousand feet of lumber each day, during the time for which plaintiff claimed one-half of the profits. Under this allegation, he proposed to prove, that no testimony was introduced to show what were the net profits of the mill. While the object of the offered testimony, is not conclusively clear, yet we think it sufficiently evident, that the defendant sought to prove by the arbitrator, that no evidence was given before them relating to the profits of the mill. This would appear to have been a material point in the controversy submitted to the

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arbitrators, if not indeed, the whole matter in dispute. The question then arises, was this testimony admissible? And our answer must be, that it was. The court below seems to have rejected it upon the ground, that no testimony was admissible to show what took place prior to the retirement of the arbitrators to make up their award; and that though they might have allowed or rejected testimony, the award could not for that reason be impeached, unless such allowance or rejection was for the purpose of defrauding one of the parties. We do not understand, however, that an award may not be impeached for other causes, as well as for fraud. If matters are considered by the arbitrators which were not submitted; if they shall commit such material errors or mistakes as prejudice either party; or omit to consider matters which were submitted; for these, and for other causes, as well as for fraud, the award may be rejected by the court to which it is returned, or impeached when an action is brought to enforce it. That this is well settled in this country, is no longer to be doubted. 1 Greenlf. Ev. § 78; *Roof v. Brubacker*, 1 Rawle, 304; *Zeigler v. Zeigler*, 2 Serg. & Rawle, 286; *Davis v. Depew*, 2 G. Greene, 260; Chitty on Cont. § 986. In the section above referred to, Mr. Greenleaf expressly states, that while ordinarily arbitrators are not bound to disclose the grounds of their award, yet they may be examined to prove that no evidence was given upon a particular subject; or that certain matters were, or were not, examined or acted upon by them; or that there is a mistake in such award.

As we understand it, the defendant in this case, proposed to prove that no evidence was given before the arbitrators upon a particular subject. This he had a right to do, and to refuse him the right, was error. The effect of the evidence is, of course, another question. The whole burden of proof, in this respect, is on the party who attacks the award. It is for him to clearly satisfy the jury, of any mistake, as also that he was prejudiced thereby. Unless some material error or defect is apparent on the face of the award, it cannot be

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avoided, unless the other errors and defects complained of, are shown fully and clearly.

As the case must be reversed on the third assignment, it becomes unnecessary to examine the alleged error of the court, in refusing to give the instruction asked by defendant. It appears to have been refused upon the ground, that it had been substantially given in a previous instruction. In the case of *Webster et al. v. Raner*, in this court, our predecessors held, that a court could not refuse a proper instruction, though the same may have been given in a different form. We refer to this case now, not for the purpose of applying it to the one at bar, or as indicating a concurrence therein, but for the purpose of saying, that if this is not the correct rule, then the instruction given, as well as the one refused, should be before us. Otherwise, we could not judge, where a correct instruction appeared to have been refused, whether there was a substantial difference, being concluded, in its absence, by the statement of the bill of exceptions, that the same had been previously given.

Judgment reversed.

POWELL v. WESTERN STAGE COMPANY.

Where judgment was rendered against a defendant, by a justice of the peace, from which he appealed, and in the District Court, at the time the jury was being called, the defendant offered to pay the plaintiff ten dollars, which was refused; and where the plaintiff obtained a judgment for ten dollars, the amount proffered by the defendant, which was a less sum than that recovered before the justice, and the court thereupon ordered the plaintiff to pay the costs of the defendant; *Held*, That by section 2346 of the Code, the defendant was required to proffer to pay a certain amount, *with costs*; and that not having done so, and the sum proffered being the amount the plaintiff finally recovered, the plaintiff was entitled to a judgment for the verdict, with costs.

Appeal from the Polk District Court.

PLAINTIFF obtained a judgment before a justice of the

peace, from which defendants appealed to the District Court. Before that court, the defendants offered to pay plaintiff ten dollars, at the time the jury was being called, but no testimony was offered on the trial to establish said proffer. The plaintiff obtained a judgment for ten dollars, which was a less sum than that recovered before the justice. The court thereupon ordered plaintiff to pay the costs of defendants, because he had recovered a less sum than that recovered before the justice, and because he had refused to take the ten dollars offered, to which plaintiff excepted. He now appeals, and assigns this ruling for error.

T. Brown, for the appellant.

J. E. Jewett, for the appellees.

WRIGHT, C. J.—This case involves the construction of sections 2345 and 2346 of the Code, which provide that the appellant must pay the costs of the appeal, unless he obtains a more favorable judgment than that from which he appealed; and that if the judgment below is against the appellant, he may proffer to pay a certain amount, with costs, and if the final amount recovered, be less favorable to the appellee than such proffer, he shall pay the costs of appeal.

Construing these two sections in connection, there can be but little doubt, that the plaintiff was entitled to his judgment for full costs. The first section refers to those cases, where the appellant appeals from a judgment in his favor before the justice, and not when there is a judgment against him. If the judgment is against him, he can provide against subsequent costs, by making the proffer provided for in the second section. In this case, the defendants did not recover a judgment before the justice, and they are not therefore aided by the first section. But they appeal, and under the second section make what is called a proffer to pay. This, however, was not sufficient to entitle them to costs, for the reason that by this section they are required to proffer to pay a certain amount, *with costs*. This they did not do, but proffered only

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the sum for which the plaintiff finally recovered. The plaintiff was entitled to his judgment for the amount of the verdict, as also his costs.

Judgment reversed.

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THE STATE OF IOWA v. GORLEY and CLOUD.

Chapter 198 of the Code, which requires the prosecuting attorney to sue out a *scire facias* against the bail, where default has been made in criminal cases, even if applicable to recognizances before justices (which may well be doubted), does not negative or preclude the right to proceed by action on the bond.

The remedy by action on the recognizance, in the nature of an action of debt, is not taken away by chapter 195 of the Code.

Where, in a criminal proceeding before a justice, the justice entered on his docket the failure of the defendant to appear; *Held*, That in an action on the recognizance against the bail, the docket of the justice, or a transcript therefrom, must be taken as verity, and cannot be contradicted, by showing that the defendant did appear.

Where, in an action on a recognizance against the bail, a transcript from a justice of the peace was offered in evidence, which contained an entry as follows: "February 6th, 1854, the day and time set for examination, the defendant, John R. Gorley, did not appear; it was therefore considered, that the bond was forfeited by said Gorley, and D. C. Cloud, security for said Gorley, stands bound to the state of Iowa, on said bond. Thomas Carroll, Justice of the Peace;" *Held*, That the justice's docket did not show such a default on the part of Gorley, as fixed the defendant's liability on the recognizance.

The defendant in a criminal case, is not required to appear until he is called, or his presence demanded by the court; and a default cannot properly be entered against him until he is called.

While a compliance with any technical form in the entry of defaults in criminal cases before justices of the peace, should not be required, the record should show that in some method, the defendant had an opportunity to know that his presence was demanded and required.

Appeal from the Muscatine District Court.

GORLEY was brought before a justice of the peace, to answer the charge of having conveyed and assigned his goods, with intent to hinder, delay and defraud his credit-

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ors, in violation of section 2745 of the Code. This was on the 4th February, 1854, and at the request of defendant, the examination was adjourned to the 6th of the same month, at 9 o'clock, A. M. In accordance with the requirement of the magistrate, the defendant, with Cloud, as his surety, entered into bond in the penalty of four hundred dollars, conditioned for his appearance at the time fixed by the adjournment, before the justice, and then and there answer the accusation so preferred against him. The state, claiming that said bond had been forfeited by the non-appearance of the accused, commenced this suit, by petition and notice in the usual form, claiming the amount of the penalty of said bond. To the petition, the defendant demurred, for the reason, that the proceeding should have been by *scire facias*, under the 198th chapter of the Code, and not by an action of debt. This demurrer was overruled.

The defendant admitted the execution of the bond, and set up several grounds of defence, in the nature of pleas in avoidance, or as causes why the said recognizance should not be estreated. To the answer, the state demurred, which was overruled. On the trial before the court, without a jury, as appears from the bill of exceptions, the only testimony offered was as follows:—The magistrate before whom the proceeding originated, was sworn, and produced his docket and the entries made therein in said proceeding. A part of the entry so made, was in words and figures as follows:—"February 6th, 1854, the day and time set for examination, the defendant, John A. Gorley, did not appear, it was therefore considered, that [the state of Iowa recover of David C. Cloud, security for the defendant, John R. Gorley, the sum of four hundred dollars, and that] the bond was forfeited by said Gorley, and D. C. Cloud, security for said Gorley, stands bound to the state of Iowa on said bond. Thomas Carroll, Justice of the Peace." The magistrate also testified, that so much of the foregoing entry as is included in brackets, was by him erased as many as two days after the said 6th of February, and that the portion following that so included, was made at the time of said erasures; that on

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the said day fixed for trial, no person appeared for the defendant or for the state; that no forfeiture was taken by calling the defendant then, or at any other time, than as appeared on the docket entry. Defendants proved that on the day set for trial, they were present at the office of the justice, by their attorney, ready to respond to any accusation that might be brought against said Gorley; that no appearance on the part of the state was made at the time set for trial, and no forfeiture claimed or taken on said day. It also appeared, that at the May term, 1854, of the District Court, the papers in the case of the *State v. Gorley*, were by the justice, sent up to said court, and on motion of defendants, dismissed, for the reason that there was nothing before the court upon which to act. Upon this proof, the court found for the state, and rendered judgment against Cloud (who alone had been served), for the amount of the penalty of the bond. The defendants now appeal, and assign for error, the rulings of the court below.

Jacob Butler and J. Scott Richman, for the appellants.

Thayer & Carskadden, for the state.

WRIGHT, C. J.—It is claimed that the court below erred, in overruling defendants' demurrer, and in rendering judgment for the state on the evidence above recited. We think the demurrer was correctly overruled. Chapter 198 of the Code, requiring the prosecuting attorney to sue out a *scire facias*, where default has been made, even if applicable to recognizances before justices, which may well be doubted, does not negative or preclude the right to proceed by action on the bond. This proceeding, under the old practice, would be technically an action of debt, and there can be no question but what at common law such recognizances might be enforced in such an action. The usual course, it is true, is to proceed by *scire facias*, and that is the one which is primarily contemplated by the Code, but it is not the only one. This same question arose in the case of *Commonwealth v. Green*,

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12 Mass. 1, and it was there held, that debt would lie upon a recognizance to the state, as well as *scire facias*. See, also, *The People v. Kane*, 4 Denio, 531; *State v. Inman*, 7 Blackf. 225.

By our practice, bail is put in by a written undertaking, executed by one or more sufficient sureties, and acknowledged before the court or magistrate taking the same. When this is thus allowed, as shown by the order of the court, the bond is filed with the clerk, and it thus becomes a part of the record, and of record. At common law, the mode was for the court or magistrate taking the same, to state at large to the bail, the obligation and its condition, to which they assented. Of this, a short minute was made at the time, but it need not be signed. From this minute, a formal record of the recognizance was prepared. Upon the filing of this, it became a part of the record of the court. 1 Ch. Cr. L., 90 *et seq.* In either method, the recognizance becomes equally a matter of record. In either case, it amounts to an obligation of record, being entered into before a court or magistrate duly authorized, with condition to do some particular act, as to keep the peace, appear to answer a criminal accusation, to pay a debt, or the like. 2 Black. Com. 341. And whether debt or *scire facias* shall be brought thereon, we do not see how the rights of the consors could be changed. What would be a good cause in excuse of the default complained of, in one case, would be equally good in the other. If the principal could be surrendered by his bail, in satisfaction of the undertaking, in one instance, so he could in the other. The one becomes as much of a verity as the other. And, again, there are strong reasons why the action of debt should be maintained, unless it is negatived expressly, or by fair implication, by the statute. On *scire facias*, you may not attach the property of the consors, and thus secure to the state the amount fixed by the undertaking. In the action of debt, or in the ordinary course by petition under our law, an attachment may be had, and the remedy thus be complete and perfect. An individual would have a right to thus secure his debt pending his action, in a suit brought on

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a bond or obligation filed in court for his benefit, and we cannot believe that the remedy of the state in this respect, was designed to be any more restricted.

In some states, we are aware, it has been held that debt would not lie in civil causes, where the statute gave a remedy by *scire facias*. *Lane v. Smith*, 2 Pick. 282; *Pierce v. Reed*, 2 N. H. 359; *Crane v. Keating*, 13 Pick. 339. But such cases will be found to be based on reasons that do not apply under our law. In some of the states, the *scire facias* is required to be served upon the bail, within one year after final judgment against the principal. And under such statute of limitations, it was held, to be reasonable and fit that a party should be held to proceed within that time, and not allowed to select a remedy under which a longer time was given for the commencement of the suit. By our law, however, no such distinction exists, and the argument founded thereon, therefore falls. So, also, in other cases, where the bond was made payable to the sheriff in a civil cause, it was urged, that if debt could be maintained where *scire facias* was provided for, the sheriff could at his will bring the action, or withhold the authority to sue, to the prejudice of the party in interest. But here the bond is made payable to the state, and she, by her officers, can alone enforce its penalty. We conclude, then, that the remedy by action on the recognition in the nature of an action of debt, is not taken away by this chapter of the Code; and this being the only objection urged against the petition, the court below did not err in overruling defendant's demurrer.

The next inquiry relates to the liability of the defendants, under the proof made. We give no weight to what is said with reference to the erasures made by the justice. These erasures, whether made at one time or another, cannot materially affect the question. He would have no power to enter up a judgment on the bond, the amount being beyond his jurisdiction, and his saying that the security should stand bound to the state on the bond, would in no manner assist to fix his liability. The material questions are, whether the allegation contained in the justice's transcript, that "Gorley

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did not appear," can be contradicted by showing that he did make an appearance in law; and if it cannot be so contradicted, whether this entering of his default, is sufficient to make the bail liable. As to the first point, we think the record as to the non-appearance of Gorley must be taken as verity. It was the duty of the justice to enter his failure to appear; and having determined and entered the non-appearance, we do not think it can be contradicted in this proceeding. If this can be done, then, upon the same principle, his record as to any other fact might be contradicted. *State v. Burton et al.*, in this court. But does this record show a default, within the meaning of the law? The accused, by the terms of his bond, and the law, was bound to appear before the justice when his presence was lawfully required. The transcript does not show affirmatively that the state appeared, or sought to further prosecute the complaint; on the contrary, if we are allowed to consider the testimony of the justice and the other witnesses, such appearance is expressly negatived. The failure of the state, however, to appear, could not excuse the defendant. But is he so required to appear, until he is called, or his presence demanded by the court? Can his default be properly entered, until he is called? We think not. And while we are by no means inclined to apply strict rules to the proceedings of these inferior courts, yet we think this is a matter of such substance and materiality, that it cannot be dispensed with. We would not require a compliance with any technical form in the entry of such defaults, but the record should show that, in some method, the defendant had an opportunity to know that his presence was demanded and required. Did this record contain anything, from which it might be reasonably inferred that Gorley had been called, we should be inclined to overrule the objection; but when it is entirely silent in this respect, we cannot think it would be a safe rule to hold the bail liable. We need hardly say, that by the practice of all our courts, a calling is deemed necessary before a default can be entered; and that the fact that a party was so called, precedes the entry of the default. Now, it is true, that if a

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party is present in person, but makes no response to the call, he cannot claim that he was not in default. The law requires that he shall not only be present when called, but in order to save his default, he shall make what is termed a technical appearance. So, on the other hand, the record should not only show that he was not present, but that he was called. This is the means of legally testing and determining whether he is present. The court cannot otherwise tell that he is in default. And so it appears to have been determined in *Park v. The State*, 4 Geo. 329; *State v. Grigsby*, 3 Yerg. 280; *White v. State*, 5 Yerg. 183; *State v. Humphries*, 4 Blackf. 538. And the reason of the rule becomes more apparent, when we consider that by the Code, the accused may appear by attorney, without being personally present, when charged with a misdemeanor, as in this instance. In view of this fact, let us see the effect of a contrary rule. And without sanctioning the introduction of the parol testimony received by the court below, we can as well illustrate it by a brief reference to the facts here developed, as in any other way. It is proved that the state did not appear by any of her officers; nor was any person present to prosecute the complaint. The attorney for the defendant is present, however, prepared to answer for him, and defend him, against the charge preferred. This fact he may not have made known, nor was it necessary that he should do so, until something was done that required the defendant to answer, or to take some step to meet the prosecution against him, on the part of the state. The defendant is not called; his representative has no intimation that anything is being done in the case, but the justice enters on his docket that the accused did not appear, without ever doing anything that required him to answer or make known his presence. To hold that a default could be properly entered, under such circumstances, would, to our minds, be making courts of justice the instruments of fraud and oppression, instead of tribunals where the legal rights of the citizen may be protected. The true rule in such cases is, that the record should show that the presence of the accused was demanded and

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required by the court, and not stop with averring that he was not present.

Without giving any force to the parol evidence, we hold that the justice's docket did not show such a default as fixed the defendant's liability on the recognizance. And while this is an action on the bond, and not a proceeding by *scire facias*, yet as already intimated, the same proof by the record, should be required of the state; and this record should show upon its face, that the state is entitled to have the recognizance estreated. 2 Ohio, 248.

Judgment reversed.

RATLIFF *et al.* v. ELLIS.

Parol evidence is not admissible to change an absolute deed into one of trust, unless there be fraud, accident, or mistake, alleged and proved.

An *express* trust can be created or declared by writing, *only*.

J. R. purchased the east half of lot seven, and the whole of lot eight, in block eight in Fairfield, in the county of Jefferson, on the 19th of May, 1839, for \$205.83; on the 9th of September, 1840, he took the bond of the county for a conveyance, and on the 5th of October, 1842, paid the purchase money; at a date which does not appear, he assigned the bond to E.; on the 9th of September, 1842, R. made a deed conveying this property to E. for the express consideration of \$500, and on the same day, E. conveyed to R. for the same consideration, certain lands in Jefferson county; R. died in November, 1846, and E. in 1851. R. and E. were on terms of intimate friendship; R. having become excessively addicted to the use of ardent spirits, and being conscious that this habit was leading him to ruin, and being fearful (so the bill alleges), that he should squander this property, and leave his family destitute, put the title in E. with the intent, and on the express promise on the part of E., that he would hold in trust for R. and his family. There being no direct proof of this arrangement, it was attempted to be shown by evidence of the following facts: that E. repeatedly, after the death of R., spoke of the property as belonging to Mrs. R.; that he called it hers at various times, and under various circumstances; that he spoke of owing her rent for a part of the premises; that when he sold part of lot eight, he did it in consultation with her, and with her consent; that the note given for a part of the purchase money, though taken in his name, was placed in her hands, and the money paid to her, without objection; that at R.'s death, one P.

2	59
92	671
2	59
94	240
2	59
115	329
2	59
139	161

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was appointed administrator, and when the property of R. was inventoried, these lots were included as R.'s, but with a note appended, stating that the title was in E.; that E. was present when this inventory was made, and the lots included in it, and *knew* it, but made no objection; that P. resigned his administration, and E. was appointed in his place; that E. in his account rendered, made a charge against the estate of \$8.41, paid for the taxes of the years 1846 and 1847, and it was attempted to be shown that this sum was for the taxes on this property. In an action by the heirs of R. against the sole devisee of E., to recover the east one-third of lot eight, in block eight in the town of Fairfield, and the rents for the remainder of the lot, for several years, and for the purchase money for which the middle third was sold by respondent, and which she received; *Held*, That there was no legal evidence to establish an *express* trust, and that the complainants could not recover.

Appeal from the Jefferson District Court.

THIS is a bill in chancery by the heirs of John Ratliff, deceased, against Mehitable Ellis, sole devisee of P. Ellis, deceased, to recover the east one-third of lot eight, in block eight in the town of Fairfield (according to the old plat), and the rents of the remainder of the lot for several years, and the purchase money for which the middle third was sold by respondent, and which was received by her.

The petition alleges that John Ratliff, the deceased, purchased the east half of lot seven, and the whole of lot eight, in block eight in Fairfield, in the county of Jefferson, on the 19th of May, 1839, for \$205.83; that on the 9th of September, 1840, he took the bond of the county for a conveyance, and on the 5th of October, 1842, paid up the purchase money; that at a date which does not appear, he assigned the bond to P. Ellis; that on the 9th of September, 1842, Ratliff made a deed conveying this property to Ellis, for the expressed consideration of \$500, and on the same day, Ellis conveyed to R., for the same consideration, certain lands in Jefferson county; and that R. died in November, 1846, and E. in 1851. These facts appeared clearly, as also, that the half of lot seven was sold in R.'s lifetime, and two-thirds of lot eight in the time intervening between the deaths of R. and E., leaving only the east one-third of lot eight, which is the subject of this suit. The claims and allegations

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which give character and direction to the petition, are such as the following: That Ratliff and Ellis were on terms of intimate friendship, and that R., having become excessively addicted to the use of ardent spirits, and being conscious that this habit was leading him to ruin, and being fearful that he should squander this property, and leave his family destitute, put the title in Ellis, with the intent, and on the express promise on the part of the latter, that he would hold it in trust for R. and his family. There is no direct proof, however, of this original arrangement. But in order to make this appear, there is an abundance of parol evidence going to show that E. repeatedly and frequently, spoke of the property, as belonging to Mrs. Ratliff; that he called it hers at various times and under various circumstances (this being after the death of her husband); that he spoke of owing her rent for a part of the premises; that when he sold parts of lot eight, he did it in consultation with her, and with her concurrence; and that the note given for part of the purchase money, though taken in his name, was placed in her hands, and the money paid to her, without objection.

In order to take the case out of the statute of frauds, and to furnish something in the nature of a written declaration or admission of the trust, the following two circumstances are relied upon: At Ratliff's death, one Pitzer was appointed administrator, and when the property was inventoried, *these lots* were included in the inventory, as R.'s; but with a note appended, stating the title to be in Ellis. Ellis was present when this inventory was made, and the lots included in it, and he *knew* it, but made no objection. Again: Pitzer resigning his administration, Ellis was appointed in his place. In his account rendered, he makes a charge against the estate of \$8.41, paid for the taxes of the years 1846 and 1847. This account is under his signature. Then, it is alleged, that there was no property upon which such tax could accrue, unless it were upon these lots; and that, taking the valuation of these, and the rate of the tax levied, the tax for those years would amount to just \$7.41. Then, a poll tax of fifty cents was ordered for each of those

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years, and it is alleged, that it was ordered to be levied upon all who paid a property tax, and that this order included women. At least, it is claimed, that the order was, in fact, extended to women. This poll tax, added to the above sum, would make the \$8.41, the amount charged by Ellis. Decree for complainants as prayed for, and respondent appeals.

Clinton & Knapp, for the complainants.

Slagle & Wilson, for the respondent.

WOODWARD, J.(1)—This cause is presented to us in an overwhelming mass of papers, commendatory of the patience, industry, and faithfulness of the counsel, but of doubtful utility toward the result. If it were possible to make a *resulting* trust of the case, it would be easy of decision, for there is much testimony tending to support such a case, and to charge Ellis, were it not that Ratliff, by *his own assignment and deed, conveyed this property to Ellis*. Were it not for this, the payment of the purchase money by Ratliff, with the testimony, would probably make out a trust, so far as the title derived from the county is concerned. But this whole mass of testimony, does not help us to dispose of the deed from Ratliff. Here the statute of frauds, and the common law rule of evidence, in relation to changing or adding to written instruments by parol evidence, meets us. Parol evidence is not permitted to change an absolute deed into one of trust, unless there be fraud, accident, or mistake alleged, and to be proved. We may personally, be convinced by the testimony, that the grantee was to hold in trust, but the peremptory rule of the law, will not permit us to declare it so. That law has said, that such a trust can be created or declared by writing, *only*. And it is our duty to administer the *law* as it is, and not to indulge our feelings, nor follow our personal convictions alone.

(1) WRIGHT, C. J., having been of counsel, took no part in the consideration of this cause.

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The counsel very rightly disclaim the idea of a *resulting* trust, and explicitly rely upon an *express* one. Where, then, is it expressed? It is not in the deed from Ratliff to Ellis. We are referred to the inventory, and to the charge for paying taxing in the administration account. The first is no writing of Ellis. It has not even his signature. It amounts to no more than the parol evidence. And as to the other items, shall a court take property from one person and give it to another, upon the strength of that charge in the account? How uncertain, how loose, how indefinite, is this evidence. It is not named in the papers on what property, even, the tax was levied. If it had been on these lots, the assessment roll would show it; and parties who have been so industrious in accumulating papers, would not have omitted this evidence. Many ways may be conceived, in which this tax may have been made up. It *may* have been levied on the outstanding debts due the estate, an amount of which is shown, which would have admitted this, and even more tax. But tax lists are not of so accurate a character, as to found a safe argument upon them. This item of evidence is too uncertain to act upon in a matter of importance, and requiring a fair degree of assurance. And this is the only item of evidence in writing, "signed by the party," which is contained in all the papers pertaining to this cause.

We cannot decree this property to be conveyed to the complainant, without overturning one of the great rules of the law, which constitutes the security of all property. If it operates unkindly in an occasional instance, we must remember that imprudence only will cause it so to work, and that the rule is a bulwark of safety to all. It is not uncommon for a court, to be compelled to act in accordance with this rule, against the fullest and clearest parol evidence. See the cases of *Harkins v. Edwards & Turner*, 1 Iowa, 426; *Clark v. Russel*, 1 Cond. Rep. 197; *Faw v. Marsteller*, *Ib.* 345, note; *Sackpole v. Arnold*, 11 Mass. 27; *Mayhew v. Prince*, 11 *Ib.* 54; *Cook v. Eaton*, 16 Barb. 439; *Webb v. Rice*, 6 Hill, 219; *Arfridson v. Ladd*, 12 Mass. 173, 177.

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However reluctant we may be, therefore, the court is under the necessity of reversing the decree of the District Court, and dismissing the complainant's bill.

HICKMAN v. SLOAN.

Where suit was brought against the maker and indorser of a note, which read as follows: "Oct. 28, 1854. Ten days after date, I promise to pay David H. Means, one hundred dollars, the balance due on house and lot, No. 2, B. 19, when said wood-work on said house is finished, for value received. Thomas M. Sloan;" indorsed as follows: "For value received, I assign the within to Samuel Hickman, Nov. 14, 1854. D. H. Means;" and where the maker of the note answered, that the note was given as the balance due on the house and lot, and the wood-work thereon, by the payee; that the work had not been completed according to the contract; and that the consideration had therefore failed, which answer was not replied to by the plaintiff; and where the indorser made no defence to the action, but replied to the answer of his co-defendant, alleging that he had performed all the work required of him by his contract with the maker, and that the consideration had not failed; and where on the trial, the indorser was offered as a witness by the plaintiff, to show the complete performance of the work mentioned in the note, to which defendant objected, because of the interest of the witness, which objection was overruled, and the witness permitted to testify; *Held*, That under the issue made, the indorser was not a competent witness for the plaintiff against the maker of the note.

Appeal from the Jasper District Court.

THIS suit was brought on the following promissory note, against the maker and assignor thereof: "Oct. 28, 1854. Ten days after date, I promise to pay David H. Means, one hundred dollars, the balance due on house and lot, No. 2, B. 19, when said wood-work on said house is finished, for value received. Thomas M. Sloan;" which note was indorsed as follows: "For value received, I assign the within to Samuel Hickman, Nov. 14, 1854. D. H. Means." The maker of the note answered, that it was given as the balance due on the house and lot, and the wood-work to be done

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thereon, by the payee; that the work had not been completed according to the contract; and that the consideration had therefore failed. To this, the plaintiff makes no reply. Means makes no defence to the action, but replies to Sloan's answer, that he had performed all the work required of him, by his contract with the maker, and that the consideration had not failed. On the trial, Means was offered as a witness by the plaintiff, to show the complete performance of the work mentioned in the note and pleading, to which Sloan objected, because of the interest of the witness. This objection was overruled, and the said witness permitted to testify. Verdict for plaintiff. Motion in arrest of judgment, and for new trial, overruled. Judgment on the verdict, and Sloan appeals, having given notice thereof to his co-defendant, as well as the plaintiff.

W. B. Sloan, for the appellant.

W. Penn. Clarke, for the appellee.

WRIGHT, C. J.—No question has been raised as to the right of plaintiff to sue the maker and indorser, in the same action, on this instrument. Neither has the right of Means to take issue upon the answer of Sloan, been questioned, by either party in the argument. And notwithstanding, plaintiff failed to reply to the affirmative matter contained in Sloan's answer, the case has been submitted without reference to the effect of such failure. We shall, therefore, pass upon the case, without intimating an opinion on these various questions, contenting ourselves with disposing of the errors assigned, upon the issues, as the parties have made them.

The first and principal inquiry is, was Means a competent witness for plaintiff? We clearly think not. Without inquiring how far the negotiability, or non-negotiability, of this note, might affect his competency, we hold, that under the issue made in the case, he should have been excluded. It is quite manifest, that the contest was between the maker

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and indorser, and not between the maker and assignee. Hickman, indeed, seems to have been an indifferent spectator of the controversy. He had taken no issue on Sloan's answer. Means had, however, and had thus, in effect, become the plaintiff. The judgment rendered, would be conclusive as to the consideration of the note, and could not be afterwards questioned by Means. It is true, that while Sloan might be discharged, plaintiff could take his judgment against Means; but Means, by the pleadings and record, was so far a party, that he could not after such discharge make Sloan liable. The judgment would be evidence as to the failure of consideration, in any suit Means might bring against Sloan, on the note. The only issue in the case was, whether the work had, or had not, been completed? whether the consideration had, or had not, failed? Who was the party to that issue? Who was to gain or lose by the result of that issue? No one, certainly, more than Means. Though called by plaintiff, he was, in effect, called by himself, to testify for himself, not to fix his own liability as indorser (for that was not disputed), but to show that Sloan did owe him the amount of the note. He was beyond question a party to the issue, and so treated; directly and legally interested in the matter in litigation; by the result he was to gain or lose; the verdict, or the issue so made, could be used against him; and, indeed, it would be difficult to conceive of a case, where a witness would, on the ground of interest, be more clearly incompetent. If he was not incompetent, then, in truth, has a legal interest ceased to disqualify a witness from testifying in his own case, against the objection of his adversary? *Safford v. Lawrence*, 6 Hill, 566; 3 Stark. Ev. 1063; 1 Greenleaf's Ev. § 329 *et seq.*; *Van Nuys v. Terhune*, 3 John. Cases, 82. It is believed, that those cases which apparently establish a contrary rule (such as that of *The Farmers' Bank of Michigan v. Griffiths*, 5 Hill, 476), are predicated upon the ground, that the assignor, not being a party to the suit, would not be concluded, by any judgment that might be rendered; and, others, again, upon the rule that the note being assigned

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before due, the maker could not object to testimony to sustain a recovery in favor of the assignee, who had taken the paper on the faith of his signature. But where the note is assigned after due, as in this case, and the assignee made a party, and becomes the substantial plaintiff in the issue, if any case can be found that holds him to be a competent witness, to prove that the note was given for a good consideration, or that the consideration had not failed, while we should give to it such weight as was due to the tribunal from which it might emanate, yet we should hesitate long, before we would give it sanction as an authority, and should do so, even, in the language of Judge STORY, "without respect or veneration."

It is objected, that the court erred in instructing the jury as to the acceptance of the work by plaintiff. The testimony is not before us, and as we can conceive of a state of proof, in which the instruction might be correct, we cannot say that in this there was error.

Judgment reversed.

HILL v. ROGERS.

Where in an action of trespass for an assault and battery against a father and son, the plaintiff dismissed his suit as against the son; and on the trial, the father offered the son as a witness, who, being objected to, was held not to be a competent witness, on the ground of being a party to the record, and interested in the result of the suit; *Held*, That the plaintiff, by dismissing his suit as to the son, became liable for the costs consequent upon his having been made a party, and the competency of the son as a witness, was as undoubted as if he had never been connected with the record.

In order to justify an assault by the father, in the defence of his son, or the protection of his own property, it is not necessary that such son shall be in real danger of great bodily harm, or that such property be in actual danger of material injury; but if the danger is such as to induce a person, exercising a reasonable and proper judgment, to interfere, in order to prevent the consummation of the injury, it is sufficient.

Appeal from the Appanoose District Court.

[T]RESPASS against defendant and his son, for assault and battery. Justification by father, that the assault was committed in defence of his son and his own property. Before the trial of the cause, the son was released by the plaintiff, and discharged by the court. On the trial, the defendant sought to introduce the son as a witness, but being objected to, he was excluded by the court, and this is now assigned for error.

Knapp & Caldwell and *James Baker*, for the appellant.

Palmer & Trimble, for the appellee.

WRIGHT, C. J.—This ruling was erroneous. The son was no longer a party to the record, nor in any manner responsible for any judgment plaintiff might recover against the father, or for costs. The plaintiff, by dismissing his suit as to the son, became liable for the costs, consequent upon his having been made a party, and his competency as a witness was as undoubted, as if he had never been connected with the record. Had there been a joint trial, there is no question but that the son might, on motion, have been released, for the want of evidence to charge him as a trespasser; and that upon such release, he would have been a competent witness. If so, *a fortiori*, he would be competent when he is released on plaintiff's motion, before the commencement of the trial. *Wilmarth v. Mountford et al.*, 4 Wash. C. C. 79; *Van Deusen et al. v. Van Slyck et ux.*, 15 Johns. 228; *Moon et al. v. Eldred*, 3 Hill, 104, and the very full note to this latter case.

The appellee in his argument insists, that the witness was not discharged, but was a party to the record at the time of being offered. We, however, can only be governed by the transcript before us, which sufficiently shows the state of the case, upon which the foregoing conclusion is predicated. If

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the record does not disclose the true condition of the case, as it occurred at the trial, it is a misfortune which cannot influence our determination.

Several objections have been urged to the instructions given and refused by the court below. The case must, however, be reversed on the above ground, and as it is manifest and admitted in the argument, that a portion of the instructions, from some cause, are not before us, we do not deem it advisable to examine and pass upon those embodied in the record. To do so, without having all the instructions, might in this case, operate unjustly upon the rights of the parties. So far as disclosed, a portion of the instructions, we think cannot be sustained. Generally, we may say, that in order to justify the father in the defence of his son, or the protection of his property, it is not necessary that such son shall be in real danger of great bodily harm, or such property be in actual danger of material injury, as is assumed in the instructions before us. But if the danger is such as to induce a person exercising a reasonable and proper judgment, to interfere, in order to prevent the consummation of the injury, it is sufficient.

Judgment reversed.

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v. THE CITY OF MUSCATINE.

In the absence of statute law, each court of record is the sole and final judge in matters of contempt.

A proceeding to enforce a penalty for disobedience to the process of injunction, is not a chancery suit, nor necessarily a part of one.

The proceeding to punish a contempt of process, though based upon, is merely incidental to, and, to a great extent, independent of, the original proceeding, in which it may be invoked.

And such proceeding need not be entitled as of the original cause.

The contempt may be punished, whether the injunction be regularly issued or not, and the court will not look into the merits of the cause in which the injunction issued.

2	69
79	317
2	69
104	52
2	69
126	349

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The proceeding is, in its nature, criminal, to punish a disobedience to civil authority.

The proceedings of a special and independent character, mentioned in section 1555 of the Code, refer to the primary proceedings specially provided for in several independent chapters of the Code, such as informations, mandamus, injunctions, and the like, but not to contempts, which may be incident to all. The intermediate orders spoken of in section 1556 of the Code, are clearly those orders which may be made in the *suit proper*, and not those proceedings which are entirely distinct from it.

A proceeding against a corporation for contempt, is necessarily personal; that is to say, the corporation, as such, cannot be imprisoned, but those acting in aid of it, violating the injunction, may.

The special provision contained in section 1606 of the Code, denying an appeal from an order to punish for a contempt, controls the general provisions regulating appeals, and extends to contempts by a disobedience of an injunction, as well as to other process.

Whether a *certiorari* will lie from an order refusing to punish for a contempt, *quere*?

Appeal from the Muscatine District Court.

THIS is an appeal from an order of the District Court of Muscatine county, discharging Joseph H. Wallace, mayor of the city of Muscatine, from an alleged contempt, in disobeying an injunction issued in a cause in chancery, wherein The First Congregational Church of Bloomington are complainants, and the city of Muscatine is respondent. In the Supreme Court, a motion was made to dismiss the appeal, for the reason that an appeal will not lie from such an order.

Cloud & O'Connor, for the motion.

Stephen Whicher, contra.

ISELL, J.—From the earnestness manifested to sustain this appeal, we are induced to examine the subject more at length, than we otherwise would. And first how stands the case, aside from statutory regulations? In the case of *The Lord Mayor of London*, 3 Willis, 188, Blackstone, Judge, says: "All courts, by which I mean to include the two houses of Parliament, and the courts of Westminster Hall, can have

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no control in matters of contempt. The sole adjudication of contempts, and the punishment thereof in any manner, belongs exclusively and without interfering, to each respective court." In the same case, says DE GRAY, C. J.: "The Court of K. B. or C. B. never discharged any person committed for contempt in not answering in the Court of Chancery, if the return was for contempt." This case is commented upon and approved by STORY, J., in *Ex parte Kearney*, 7 Wheat. 41. The same doctrine is explicitly laid down by BLACKFORD, J., in *Leavenworth v. Tipton*, 1 Black. 166, which was brought before the court on error. This was a case, where the defendant had been released from an attachment for contempt in not executing a writ as sheriff. Says that distinguished judge: "Courts of record have exclusive control over charges for contempt, and their conviction or acquittal is final and conclusive." Again, says he, "Whether the Circuit Court has been treated with contempt or not, is for that court alone to decide." See the opinion of KENT, C. J., in the *Yeates' case*, 4 Johns. 354; *Johnson v. The Commonwealth*, 1 Bibb, 598; *Wyatt v. Magee*, 3 Ala. 94; *Ex parte Passmore Williamson*, Sup. C. Penn., Aug. 1855, reported in *American Law Register*, Vol. IV, p. 27. These authorities are conclusive, that in the absence of statute, each court of record is the sole and final judge in matters of contempt.

But we are told, that our constitution provides that the Supreme Court shall have appellate jurisdiction only, in all cases in chancery, and therefore an appeal must lie, or no remedy exists. If a proceeding to enforce a penalty for disobedience to the process of injunction, is a chancery suit, or necessarily a part of a chancery suit, this is true. But is it so? We think most clearly not. It is incident to all courts to enforce obedience to its process, and is by no means a peculiar incident of a court of equity, more than any other court of record. The proceeding to punish a contempt of process, though based upon, is merely incidental to, and to a great extent independent of, the original proceeding in which it may be invoked. Indeed, such proceeding need not be entitled as of the original cause. *Stafford v. Brown*, 4

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Paige Ch. 362; *Folger v. Hoogland*, 5 Johns. 235, and authorities. The contempt may be punished, whether the injunction be regularly issued or not; and the court will not look into the merits of the cause in which the injunction issued. *People v. Spaulding*, 2 Paige Ch. 326; *Sullivan v. Judah*, 4 Paige Ch. 444. The proceeding is in its nature criminal, to punish a disobedience to civil authority, whereby the civil arm is weakened and the majesty of the law dethroned. Where appeals from the regular proceedings in cases in chancery, have been constantly allowed, appeals from proceedings for contempt, have never been recognized, except by force of statute law. We think, then, that such proceeding is not necessarily a part of a chancery suit.

Our attention has been called to the several provisions of the statute, that may by any possibility have a bearing on this question. Thus, section 1598, of the Code, provides, among other things: "The following acts or omissions are deemed to be contempts, and are punishable as such by any of the courts of this state, or by any judicial officer acting in discharge of an official duty as hereinafter provided, * * * for illegal resistance to any order or process made or issued by it; and for any other act or omission specially declared a contempt by law." By section 1600, the punishment for contempt may be by fine or imprisonment, or both, but where not otherwise specially provided, the Supreme and District Court are limited to a fine of fifty dollars and an imprisonment not exceeding one day. By section 1601, if the contempt consists in an omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he performs it. In that case, the act to be performed, must be specified in the warrant of commitment. By section 1606, "*No appeal lies to an order to punish for a contempt, but the proceedings may, in proper cases, be taken to a higher court for review, by certiorari.*" Also, to sections 2201 to 2205, regulating injunctions, and also to sections 1555 and 1556, regulating the appellate jurisdiction of this court, which are as follows: "The Supreme Court has an appellate jurisdiction over all final judgments and decisions of any of

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the district courts, *as well in cases of civil actions properly so called, as in proceedings of a SPECIAL or independent character. Intermediate orders, involving the merits and materially affecting the final decision, may also be reversed on appeal.*" Again: our attention has been drawn to the provision regulating the review of criminal proceedings: Section 3038, "The only mode of reviewing a judgment or order in a criminal action, is by writ of error."

It is insisted that sections 1355 and 1356, clearly give the right to appeal, and stress is laid upon the words, "*as well in civil actions properly so called, as in proceedings of a special or independent character,*" as furnishing an interpretation of section 1356. By the proceedings of a special or independent character here alluded to, we understand, the primary proceedings specially provided for in several independent chapters of the Code, such as informations, mandamus, injunctions, and the like, but not contempts, which may be incident to all. Yet were there a special provision that an appeal should not lie to any one of these, but that it might be reviewed on *certiorari*, we should conclude, that it too was withdrawn from the general provision giving an appeal; and more especially, if an appeal had not been usual for the review of such proceeding. The "intermediate orders, &c.," are clearly those orders which may be made in the *suit proper*, and not those proceedings which are entirely distinct from it. The determination of the question of contempt or no contempt, can never affect the final decision, nor involve the merits. The party's right to the relief prayed for in the bill, must be the same, whether the injunction be obeyed or disobeyed. But it is again insisted, that without this right, the process of injunction is powerless. We see no weight whatever in this objection. By section 2203 of the Code, if the party charged with the contempt fails to sufficiently excuse it, the judge may require him to give bond, with surety, for his appearance at the next term of the court, and also for his future obedience to the injunction; and by section 2203, if he fail to do so, he may be committed until the next term of court. And notwithstanding such security be

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given, by section 2205, the court may proceed to punish the contempt in the *usual mode*. By this, we understand, fine and imprisonment, as provided in the general chapter regulating contempts. But if he fail to give bond, section 1601 authorizes imprisonment, until he shall. Now, without this last provision, which is found in the same chapter in which an appeal is denied, we must come to the conclusion, either that punishment for disobedience to an injunction is unlimited, or that it is confined to the chapter regulating injunctions, neither of which is warranted. We must rather conclude that the codifiers, in accordance with the general apparent design of the Code in other particulars, intended by this chapter entitled contempts, to adopt a uniform mode of punishment of contempt, when not otherwise specially declared. We see no reason why they have not made this mode efficient. It is so, if imprisonment can be. A proceeding for contempt is necessarily personal; that is to say, the corporation, as such, cannot be imprisoned for contempt. But those acting in and of it, violating the injunction, may.

But again: we fail to see any reason why the efficiency of the remedy, should be affected by the question, whether it must be reviewed in any one way or another. By determining that no appeal lies, we affect none of plaintiff's rights. The corporation is as liable for any injury done to plaintiff, as though no injunction had been issued, or proceeding to punish a disobedience had. In any view of the case in which we have been able to see it, we are constrained to the conclusion, that the special provision contained in section 1606, denying an appeal from an order to punish for a contempt, is controlling of the general provisions regulating appeals, and extends to contempts by a disobedience of an injunction, as well as of other process.

But there is still a grave question lying back of this; namely, whether even a *certiorari* will lie from an order *refusing* to punish for a contempt. But of this *quere*; it is not necessary to be here decided.

Appeal dismissed.

Gourley v. Hankins.

GOURLEY v. HANKINS.

In relation to officers, civil and criminal, when the question arises between third parties, parol evidence is admissible to show that they *were* officers at a given time, and perhaps, to show that they acted as such.

As between third persons, when the question is, whether a person doing an act was an officer, it is sufficient to show him to be such *de facto*; and it is not required of the party claiming or justifying under the act of the officer, to prove that he was such, by the highest and best evidence.

The highest and best evidence is required only, when the officer himself is a party, and he justifies or claims by virtue of his office.

The effect of the statute, entitled "An act to repeal an act to authorize the appointment of a county agent in and for the county of Johnson," approved February 24, 1847, was only to appoint the clerk of the board of county commissioners as agent of the county, for selling lots and making deeds.

The clerk does not perform these acts as clerk, but as agent.

The repeal of the act entitled "An act to authorize the appointment of a county agent in and for the county of Johnson," approved February 16, 1842, by the act approved February 24, 1847, did not remit the clerk of the board of county commissioners to the general act, entitled "An act to authorize boards of commissioners to appoint agents to dispose of real estate," approved February 17, 1842, for his powers and duties; but he still derives those powers from, and finds those duties defined in, the act of February 16, 1842.

The repeal of the act of February 16, 1842, by the act of February 24, 1847, must be construed as a repeal of the former act, so far as it gave the power to appoint a county agent, but not so far as it conferred authority upon the agent.

The repeal is in effect, a repeal of the act of February 16, 1842, *saving* certain rights or powers under it.

And where in an action of right, the defendant, to prove title in himself to the premises, offered in evidence a deed, purporting to have been executed by the county of Johnson, concluded and signed as follows: "In testimony whereof, I, Stephen B. Gardner, agent of the county of Johnson, in the state of Iowa, have hereunto set my name, this 9th day of February, A. D. 1848. Stephen B. Gardner, agent of J. C.," and offered to prove by parol testimony, that said Gardner, at the time of the execution of said deed, was clerk of the board of county commissioners of Johnson county, which testimony was rejected, and the court refused to admit the deed in evidence; *Held*, 1. That the oral testimony offered, as well as the deed, were improperly rejected. 2. That the parol testimony offered, did not tend to change or alter the deed. 3. That the agent had power, under the act of February 16, 1842, to make the deed.

The rule that the elder title from government must prevail, holds in relation to the government only, where the doctrine of notice does not apply.

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Appeal from the Johnson District Court.

THIS is an action of right, brought to recover lot number three, in block number twenty-seven, in that part of Iowa City, laid off by the commissioners of Johnson county, as the county seat of said county. The plaintiff claims, under a deed from the said county, dated August 4, 1843, and executed by "Fernando H. Lee, agent of Johnson county." This was done under the act of 16th of February, 1842 (Stat. 1841-42, 62), authorizing the appointment of a county agent in and for the county of Johnson. On the 17th of February, 1842, a *general* act passed, authorizing the board of commissioners of counties to appoint agents to dispose of the real estate of the counties. Stat. 1841-42, 89, Rev. Stat. 66.

By an act of February 24, 1847 (Stat. 1846-7, 124), the special act of February 16, 1842, is repealed. This repealing act is as follows: "Section 1. That the clerk of the county commissioners' court of Johnson county, be, and he is hereby authorized to perform all the duties heretofore enjoined upon the county agent. Section 2. That an act to authorize the appointment of a county agent in and for the county of Johnson, be, and the same is hereby, repealed."

The defendant claims, under a deed, purporting to be of the county, conveying the same lot, dated 9th of February, 1848, concluded and signed as follows: "In testimony whereof, I, Stephen B. Gardner, agent of the county of Johnson, in the state of Iowa, have hereunto set my name, this ninth day of February, A. D. 1848.

"STEPHEN B. GARDNER,
Agent of J. C."

On the trial, defendant offered this deed in evidence, and with it, parol proof, that Gardner was clerk of the county commissioners' court, at the time of the execution of the deed. This evidence, and the deed, were rejected by the court, which ruling is assigned for error.

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W. Penn. Clarke, for the appellant.

J. D. Templin, for the appellee.

WOODWARD, J.—The evidence offered, to show that Gardner was clerk of the commissioners' court, was competent, and should have been received. *Van Ness v. Bank U. S.*, 13 Pet. 21; *Shulls v. Moore*, 1 McLean, 520, recognizing the foregoing case. *The People v. Ammons*, 5 Gilm. 105.

The term "parol evidence," as used in the bill of exceptions, is assumed to mean oral evidence, as this is the ordinary sense in which it is used, although some of the books, and some of the writers on evidence, use the word parol in its broader sense, as well when speaking of evidence, as when speaking of contracts. This evidence is allowed in relation to officers, civil and municipal, to show that they were officers at a given time, and, perhaps, to show that they acted as such. And the same has been done in relation to an officer of a corporation. *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 326. This practice, however, is limited to cases where the question arises between third persons. And it is familiar to every lawyer, where an act has been done, which could be done by an officer only, or by a certain officer, to show that the person doing this act was such officer, and to show, by oral evidence, that he was an officer *de facto*. 1 Phil. Ev. 432; 3 Ib. 449, notes 280, 281. As between third persons, when the question arises, whether a person doing an act was an officer, it is sufficient to show him to be such *de facto*; and it is not required of the person claiming or justifying under the act of the officer, to show that he was such, by the highest and best evidence. This is required when the officer himself is a party, and he justifies, or claims, by virtue of his office.

It is difficult to perceive, why this principle does not apply to the case before us. Gardner has done an act which is valid, if done by the clerk, and which could be done only by the person holding that office. And why

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should it not be shown, that he was the clerk? The whole deed runs in the name of the county, and shows that it is the county who sells; and can it be true, that the party must lose his property, because the agent has omitted to add to his name, the description of office, when he was, in fact, such officer? But it is argued, that the evidence offered, tends to change, or alter a written instrument. The rule above commented on, answers this in part, at least. The evidence is, to show that Gardner was an officer—the clerk. The contract is by the county, and the clerk was the person authorized to execute it. Does this, in fact, tend to change, or alter the contract? It seems, on the other hand, only to perfect it. If it were a private contract, on which, by possibility, Gardner might be charged, he, at least, could not offer such evidence, however it might be with a third person. But it professes, on its face, to be the contract of the county, and Gardner professes to be but an agent. It is sought to show, by the evidence, that he was the person upon whom the law conferred the agency. The case is not, then, within the rule relating to private contracts executed by an agent, and where the agent's own liability might arise. It is a question of authority only, in the person executing it as agent, and evidence of an agent's authority, is always admissible. If it were a private contract, on which the question was, whether he or his principal was liable, it would be a different matter. 1 Am. Lead. Cases, 608, in note; *Harkins v. Edwards & Turner*, 1 Iowa, 426.

Perhaps, however, the argument is intended to apply in this form: that having signed as *agent*, it cannot be shown that he was *clerk*, nor be claimed that he executed it as clerk. This thought has no weight. It is not pretended but that this act was, at least, an *attempt* to exercise the power given by the acts named in the statement. And the case contains sufficient to show, that such was the transaction. His styling himself agent, does not negative the idea that he may have been clerk, nor that he did the act in his capacity of clerk. The two things are not inconsistent. He *was* an agent, call him what else you will. The county *clerk* was

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the county *agent*. He was made so by the law. It has probably been thought that, as the law repealed the authority to appoint an agent, and devolved his powers and duties upon the clerk, he must necessarily style himself clerk, and cannot style himself agent; that the calling himself agent is, as it were, putting himself upon the repealed act as county agent by appointment. But this is not so. The effect of the statute is only to appoint the clerk as agent. And though it is certainly, by far the better mode, as this case teaches, to show upon the face of the deed that he is the proper officer, as that would constitute *prima facie* evidence; yet there is no legal difficulty in the way of permitting that proof to be made in another manner. And farther, is not this deed good on its face? The court is much inclined to regard it so. We have said that the effect of the statute was only to appoint the clerk as agent. Strictly speaking, he does not perform the act as clerk, but as agent, for this was no part of the duty of county clerks, as clerks. He really acts as agent, in this, and he so styles himself. Now, why is not this as good *prima facie* proof that he was such, as the similar manner of signature of Fernando H. Lee, in the plaintiff's deed. But we will not put the case upon this, as the other ground is sufficient.

Since he has not expressed his office, it may be shown *aliunde*, and then the presumption will be, that he executed it as such officer; and the same presumption would hold, if he had not added the words "agent of J. C." See 18 Pet. *ut supra*. The danger to our titles and property, apprehended by the plaintiff's counsel, does not exist. In the case put by him, of a deed purporting to be from the state, and signed by the *name* only, of the governor, without the addition of his office, it would undoubtedly be good, and his office might be shown by other proper evidence. Patents signed by the president of the United States do not express his office fully. They are usually, "By the President, Z. Taylor." President of what? His act of signing does not show. But in this instance, the president of the time supposed, is judicially recognized. This judicial cognizance,

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however, in relation to some high officers, holds the same place with proof as to others, who are not judicially known. But the better way is, always to affix the office, as the paper then carries the proof on its face.

But it is urged, that if the court erred in rejecting this evidence, it was an error that did not prejudice the defendant, because he cannot hold under the deed in any event, and therefore the error cannot avail him here. It is said that Gardner, even as such clerk, could not make the deed and convey the property. We will examine this proposition. The argument is thus: that by the special act of February 16, 1842, the agent of Johnson county could make the deeds, but that by the general act of February 17, 1842, the agent could not make them; that by the act of 1847, repealing the special act of February 16, the clerk is remitted to the general act of February 17, for his powers, and consequently could not make the deed, but that it must be made by the county commissioners. If the agent or clerk is thus remitted to the above general act for his power, this argument is a valid one. And probably the result of the cause, depends upon this point. It must be noticed that under the above special act, the powers and duties of the agent of Johnson county, are more numerous and extensive than those of agents appointed under the general act. He is to have the possession and control of all moneys, bonds, notes, and other papers arising from, or belonging to, the sale of the lots of the county, and the treasurer is to pass these over to him; he is to collect the moneys arising from the sales, and pay over on orders from the county commissioners; he is to take all notes and obligations for the sale of county property, in the name of himself and his successor in office; he is to make title bonds and execute deeds, and to execute deeds on bonds before given by the board of commissioners. Under the general act, the agent makes the contract, and gives a certificate only, and when the payment is made, the board of commissioners make the deed. By the repealing act of 1847, the clerk is authorized to perform *all* the duties heretofore enjoined upon the county agent. There is, perhaps,

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some force in the words, *the county agent*. It is not "*heretofore enjoined upon county agents*," but upon *the county agent*. But the principal argument lies in the difference of authority conferred by the two acts, and in the fact that the repealing act, does not transfer these *other* powers to any other officer. We are inclined to the opinion, therefore, that the clerk is not remitted to the act of February 17, for his powers, but still finds them in that of February 16, when he makes the deed, and consequently, that he had the power to make it. The repeal must be construed as a repeal of the act, so far as it gave the power to appoint an agent, but not so far as it conferred authority upon the agent. Under the other view, the clerk could not "perform all the duties heretofore enjoined upon the county agent." This is the same thing, in effect, though in different terms, as the repeal of an act, *saving* certain rights or powers under it. Thus, the crimes act of 1839, was repealed by that of 1843, saving the power to punish crimes committed under the first. This was an absolute *repeal* of the *whole act*, and yet it *saved* the above power. In the case at bar, it was a repeal of the county agent (so to speak), as a distinct officer, and placing the same powers and duties upon another.

We have viewed the case strictly with reference to the manner in which it is presented *to us*, and with reference to the errors assigned; the second of which, relates to the rejection of the evidence of Gardner being clerk, and the first of which, is on the rejection of the deed. This rejection of the deed, we take to have been for the reason, that Gardner does not appear upon it, to have been clerk, and we adjudicate it upon no other. Evidence being admitted that Gardner was clerk, then, *quoad hoc*, the deed is admissible.

The rule that the elder title from government, must prevail, does not apply. It holds in relation to the government only, where the doctrine of notice does not prevail.

The argument of plaintiff's counsel, that the bill should show that this was all the evidence, is fallacious, and has no place in the present attitude of the cause. This was one step in the defendant's evidence, and an important step.

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Being stopped here, he is not obliged to go farther, and cannot, until this is settled.

The judgment of the District Court is reversed, and a writ of *procedendo* will issue, directing that court to proceed in the cause, in a manner consistent with this opinion.

MOTTS v. USHER & THAYER.

Under section 2388 of the Code, a negro cannot be allowed to give testimony in a cause where a white person is a party.

And where in an action wherein a negro was the plaintiff, and the defendants were white persons, the defendants offered a negro as a witness, who was objected to, on the ground of incompetency, which objection was sustained; *Held*, That the witness was properly excluded.

Section 2394 of the Code, which provides that the prohibitions in the previous sections, are not to apply to cases where the party in whose favor the respective provisions are enacted, waives the right thereby conferred, refers to the persons named in sections 2391, 2392, and 2393, as husband and wife, attorneys, physicians, ministers, and the like; and cannot refer to a class of cases, where the exclusion of the testimony is for the benefit and protection of neither party exclusively, but for all parties, where either is a white person.

Appeal from the Muscatine District Court.

THE plaintiff is a negro; the defendants, white persons. On the trial below, the defendants offered one Hinton, a negro, as a witness, to the introduction of whom, plaintiff objected, upon the ground that said witness, being a black man, was incompetent to testify in said cause. This objection was sustained, and the witness excluded, to which defendants excepted. The cause was tried by the court, and the whole testimony is embodied in a bill of exceptions. Judgment for plaintiff. Defendants appeal, and assign for error, the excluding of the testimony of the witness, Hinton, and the judgment of the court on the testimony introduced.

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Thayer & Karskadden, for the appellants.

Cloud & O'Conner, for the appellee.

WRIGHT, C. J.—The competency of the witness, Hinton, must depend upon the construction to be given to the concluding part of section 2388, of the Code. This provides, that an Indian, a negro, a mulatto, or a black person, shall not be allowed to give testimony in any case wherein a white person is a party. This language is explicit, and most clearly renders the witness incompetent. Here was a cause, in which one party was a white person; and in all such cases, "the testimony of a negro is, by the express words of the law, to be excluded." The provision is not, that such persons of color shall not be witnesses against a white man, but they are prohibited from testifying in any cause wherein a white person is a party, and this, whether offered for, or against such party.

It is urged, however, that this provision was designed for the benefit of, and to protect the white person; and that the defendants having waived this objection, by offering to introduce the witness, the plaintiff, being a negro, cannot object. To sustain this position, we are referred to section 2394, of the Code, which provides, that the prohibitions in the previous sections, are not to apply to cases where the party in whose favor the respective provisions are enacted, waives the right thereby conferred. This position would be tenable, if the provision contained in section 2388, was alone for the benefit of the white person. But as already shown, this is not the language of the Code, and so far as relates to the reason and policy of the law, we can conceive of quite as weighty considerations for excluding the testimony, when offered by, as when offered against, a white man. If the plaintiff was a white man, it would be clear that the witness would, if objected to, be incompetent, when offered by the defendants. So also, if offered by the plaintiff, a negro, against the defendants. Why, then, should the law make him competent for a white person against a negro? It is said that

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the reason he is incompetent for the black against the white person, is, that the blacks are clannish, and might confederate to the great injury and prejudice of white suitors. But, on the other hand, it is not to be disguised, that from the dependent position of this unfortunate portion of our population upon white persons, they might be used as instruments by them, to injure and prejudice black suitors. And, indeed, there would appear to be quite as strong reasons for excluding such witnesses in one case, as the other. When both parties are black, such witnesses are competent; otherwise not, if objection is made. Section 2394, refers to the persons named in sections 2391, 2392, and 2393, as husband and wife, attorneys, physicians, ministers, and the like, and cannot refer to a class of cases where the exclusion of the testimony, is for the benefit and protection of neither party exclusively, but for all parties, where either is a white person.

So far as relates to the finding of the court on the evidence, we need only say, that after carefully examining the same, we see no reason for disturbing the judgment. We could not disturb it, unless so clearly against the weight of testimony, as to justify us in saying that the finding was unwarranted. This we could not do in this case.

Judgment affirmed.

TAYLOR, Adm'x v. FRINK & Co.

T. in his lifetime, commenced suit for damages occasioned by his being overturned in a stage-coach of the defendants; after T.'s death, his wife was appointed administratrix of his estate, and substituted as a party to the suit. She filed an additional petition, claiming \$5,000 damages in her own right, in consequence of the death of her husband. A judgment of \$1,500 was rendered, and the cause appealed to the Supreme Court, where the judgment was reversed. The parties then made a settlement, the defendants paying the sum of \$400, and taking from her a release, which they filed in the cause. At a subsequent term of the District Court, the plaintiff moved the court to set aside the settlement, because it was entered into without the approbation of the county court, and because it was procured by fraud and misrep-

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resentation; and on the hearing of the motion, the court held the settlement void, and set the same aside. *Held*, 1. That the regular way for the defendants to have availed themselves of the settlement, was, to have answered over the accord and satisfaction, *puis darrien continuance*. 2. That the court could not properly set aside the settlement, on motion. 3. That if the settlement was procured without fraud or collusion on the part of the defendants, upon being properly pleaded, it may be made a defence to the suit. 4. That sections 1336, 1359, 1361, and 1362, of the Code, did not prohibit the making of the settlement, without the approbation of the county court. Sections 1336, 1359, 1361, and 1362, of the Code, do not, in any manner, affect the validity of contracts made with an executor or administrator, *bona fide*, in relation to the personal property, or *choses in action*, of the intestate.

Appeal from the Monroe District Court.

TILGHMAN A. TAYLOR, since deceased, commenced this suit to recover damages occasioned by his being overturned in the stage-coach of the defendant. On his death, Margaret Taylor, his widow, was made administratrix of his estate, and substituted as party to the suit. She filed an additional petition, claiming \$5,000 damages, in her own right, in consequence of the death of said Tilghman. A recovery of \$1,500 was had, and the cause appealed to the Supreme Court, where the judgment was reversed. Pending the suit, and after the reversal, the parties made a settlement, the defendant paying the sum of \$400, and taking from said Margaret a release, which was by the defendant filed in the cause. At the last term of the Monroe District Court, the plaintiff moved the court to set aside and disregard the settlement of the case; first, because it was entered into without the approbation of the county court; and secondly, because the same was procured by fraud and misrepresentation. On the hearing of this motion, the settlement was by the court, held void and set aside; from which ruling the defendant appeals, and assigns the same as error.

J. C. Knapp, for the appellant.

H. B. Hendershott, for the appellee.

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ISELL, J.(1)—This cause comes very irregularly before the court. The release in writing, evidencing the settlement of the cause, which it appears the court took upon itself the power to annul, on motion, does not appear to have been plead as an accord and satisfaction since the last continuance; nor does it appear to have been offered in evidence on the trial of the cause and rejected; but from the record, it is manifest, that the court proceeded to pronounce on its validity, on motion, as preliminary to the further progress of the cause. The regular way for the defendants to have availed themselves of such accord, was, to answer over the accord and satisfaction *puis darrien continuance*. *Watkinson v. Inglesby & Stokes*, 5 Johns. 392; 1 Chitty Plead. 569. Although in assumpsit and case, at common law, accord and satisfaction may be given in evidence under the general issue (*Panamore v. Johnson*, 1 Ld. Raym. 566; *Fitch v. Sutton*, 5 East. 230; *Bird v. Randall*, 3 Burr. 1353); yet, with us these forms of action are abolished, and we have no general issue, properly so called; hence, we conclude, that the more regular and safe practice is as above indicated.

But counsel for appellee insists, that the question of the validity of the settlement, was one that the court only could decide, and if it determined the question correctly, this court should not reverse the decision, although it proceeded irregularly. We cannot accede to this view. The motion assumes two grounds. First, that the settlement was made without the approbation of the county court. Secondly, that it was fraudulently procured. Either of these grounds involves the truth of extrinsic facts, which should be properly put in issue, before being passed upon. The contracts of persons, solemnly entered into, are of too sacred a nature, to be set at naught, on mere motion. While we would seek to disregard merely technical objections; yet, we think, it would be going too far, to lend countenance to such irregularity. To set at naught contracts in this manner, is to de-

(1) WRIGHT, C. J., having been of counsel in this cause, took no part in the adjudication thereof.

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prive the citizen of property, without that due process of law guarantied to him. We hold, therefore, that in setting aside the settlement, on motion, the court erred.

Perhaps we should go no further. But in view of the fact, that it may tend to suppress litigation, to intimate a further view which we entertain in the case, and as the same has been brought to the attention of the court in argument, we deem it proper to add, that if the settlement evidenced by the writing in this cause, was procured without fraud or collusion on the part of defendant, it, being properly plead, may be made a defence to the suit. As to the power of the administrator to make such settlement, see Story on Contracts, § 252, and authorities cited in note.

We have been referred by appellee to sections 1336, 1359, 1361, and 1362 of the Code, as prohibiting such settlement, without the approbation of the county court. We understand these provisions to apply as between legatees, distributees, or creditors, and the executor or administrator; and that, an executor or administrator, in order to shield himself from liability to either of these, may avail himself of the approbation of the court, and be thereby protected; but we do not understand that these provisions, in any manner affect the validity of contracts, *bona fide* made, in relation to the personal property, or choses in action, of the deceased, with such executor or administrator.

Judgment reversed and cause remanded.

PORTER & LUCAS v. HELMICK.

There is no express statutory provision, limiting the time within which the proceedings of a justice of the peace must be removed into the District Court, by writ of error; nor is there anything from which, by any fair implication, the time can be said to be limited.

Where a writ of error was dismissed on motion, on the ground that it was not sued out within the time prescribed by law; *Held*, That the motion was improperly sustained.

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And where the bill of exceptions stated, as an additional reason for dismissing the writ of error, that an appeal had been previously taken by the same party and disposed of; *Held*, That the question could not be raised in this manner.

Appeal from the Muscatine District Court.

JUDGMENT before a justice, in favor of plaintiffs, on the 9th of June, 1853. June 6th, 1854, writ of error issued from the District Court.

At the October term, 1855, the plaintiffs moved to dismiss the writ, because it was not sued out within the time prescribed by law. This motion was sustained, and the writ dismissed, for the reason stated in the motion, and also, as stated in the bill of exceptions, because an appeal had been previously taken by the same party, and disposed of in the same cause. The defendant appeals, and assigns for error, this ruling of the court, dismissing the writ of error.

S. Whicher, for the appellant.

Cloud & O'Conner, for the appellees.

WRIGHT, C. J.—Whether the taking of an appeal, would preclude the same party from his right to a writ of error, is not necessary to now decide. This question was not presented to the court below by the motion, and could not be properly raised in this manner. It might be the proper matter for a plea in abatement, but not for a motion. It should be so raised as that issue could be taken thereon, and the question regularly adjudicated. Whether there was or was not such an appeal, was a question of fact, which was not, and could not, be made by this motion; and to dismiss the suit on that ground, was deciding a point which the plaintiffs had not suggested, and which the defendant had no opportunity to contest.

Should the suit have been dismissed, then, on the ground stated in the motion? We think not. What is the time within which the proceedings of a justice of the peace must

be removed into the District Court, by a writ of error? This question is more easily asked than answered, so far as our law is concerned. We find no express provision on the subject, nor is there anything, from which, by any fair implication, the time can be said to be limited. An appeal from a justice, must be taken and perfected within twenty days after the rendition of the judgment, but no such time is fixed for obtaining a writ of error. In the one case, a trial on the merits, is the result. In the other, the law of the case on the errors complained of, is alone re-examined. There is, therefore, no such analogy between the two proceedings, as that the limitation in the one, should by fair implication, govern the other. Neither will it do to hold the inflexible rule, that the writ of error must be taken to the term of the District Court to be holden next after the trial by the justice, for this would exclude entirely those cases in which parties, however diligent, would be unable to obtain the writ. The justice, when served, is required to make his return with the least practicable delay, and the return should be made to the next term after such service. But the law nowhere requires, that the writ shall be applied for and issued before the next term. It is true, that if the party wishes to stay the proceedings, he must enter into a recognizance like that required for an appeal, but not within the same time, nor within any fixed or definite period. If the legislature, then, has failed to fix any time within which the writ must be applied for and issued, upon what principle is it, that we shall say twenty days, or before the next succeeding term of the district, or any other number of days, is the limit?

Such a rule would be purely arbitrary, having neither analogy nor sufficient necessity to sustain it. And it is worthy of remark, in this connection, that while a specific period is fixed for taking appeals to the District Court, from all inferior tribunals, and for perfecting appeals to this court; yet, for writs of error to the District Court, and for *certiorari*, the time is left indefinite and unlimited. If this was an omission, we cannot, in the absence of an established rule,

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remedy it. If by design, then, the remedy is not with this department, but with the law-making power.

It is to be regretted, perhaps, that the time has not been fixed by positive enactment, for we are aware that a great want of uniformity prevails throughout the different districts of the state. Some limit to twenty days; others, to the next term; and others, again, to one year or a year and a day. But in the absence of a positive provision, or established rule, we cannot see how either of these limitations can obtain, with any more propriety than the time provided for in 10 and 11 Wm. III, c. 14, by the provisions of which, the writ of error must be commenced or brought within twenty years after fine levied, recovery suffered, or judgment signed or entered of record.

It is not necessary, in the decision of this case, to hold that twenty years is the limit; nor do we so decide. We concur, however, in saying that the writ should not have been dismissed, for the reasons assigned in the motion; and in sustaining the same, the court below erred.

Judgment reversed.

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CONBOY v. IOWA CITY.

Section thirteen of the act entitled "An act to incorporate Iowa City," approved January 24, 1853, which provides that appeals to the District Court in the same county, shall be allowed from the judgments and decisions of the mayor, in the same cases, time and manner, as may at any time be allowed by law from those of other justices, and they shall be tried as in other cases, is not restrictive, but confers a general right of appeal.

Appeals from the judgments of the mayor of Iowa City, may be taken by any person aggrieved; but, in similar cases, they must be taken in the same time, and in the same manner, as appeals are taken from a justice of the peace.

Section twelve of the same act, which confers on the mayor of Iowa City, exclusive *original* jurisdiction for the violation of the ordinances of the city, implies that that officer is not to have *exclusive* jurisdiction or final jurisdiction, but that a review of his proceedings by the District Court is contemplated.

The mayor of Iowa City is authorized to take judicial notice, *ex officio*, of the city ordinances.

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Under section nineteen of the charter of Iowa City (Laws of 1853, 99), which provides that the city ordinances shall also be recorded in a book to be kept for that purpose, and signed by the mayor, and attested by the recorder, the signature of the mayor to the copy of record, is not essential to the taking effect of an ordinance.

So much of section nineteen as requires the city ordinances to be signed by the mayor, attested by the recorder, and before they take effect, to be published in one or more newspapers published in the city, at least ten days; and if there be no such paper, they shall be posted up in each ward the same length of time, are essential to the ordinances taking effect; but those requirements following these provisions, relate to the preservation of the ordinances, and are simply directory.

Appeal from the Johnson District Court.

THIS was an action brought by Iowa City against Peter Conboy, claiming of him \$100, and charging that the said defendant, on the first day of December, 1854, did keep a billiard table within the corporate limits of Iowa City, where games of skill or chance were played, without first having obtained a license so to do, contrary to the form of the ordinance in such case made and provided, and against the peace and dignity of the said Iowa City, whereby an action hath accrued to said city, to have and recover of said defendant the said sum of one hundred dollars. The second section of the ordinance, under which this suit was brought, is as follows: "If any person shall set up, establish, keep, or continue any billiard table, ball or ten pin alley, or other table or alley, where games of skill or chance shall be played, within the limits of Iowa City, without first having obtained a license so to do, every person so offending shall forfeit and pay to the city of Iowa City, the sum of one hundred dollars, which may be recovered by civil action in the name of the city, or complaint before the mayor, as in criminal prosecutions before a justice of the peace."

To the petition, defendant answered as follows: 1. "That an action hath not accrued to the said plaintiff, in manner and form as set forth in said petition, because he says, there is not, and never was, any ordinance of Iowa City in force, nor is there any ordinance now in force, whereby the said

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defendant is liable to pay the said Iowa City one hundred dollars, or any less sum, for keeping a billiard table, on which games of skill or chance are played, within the corporate limits of Iowa City aforesaid; he therefore prays judgment.

"2. And for further answer, the defendant says, that he specifically denies that he is indebted to said plaintiff in the sum of one hundred dollars, or in any less sum whatever, as alleged in plaintiff's petition; and this defendant positively denies, that on the first day of December, 1854, he did keep a billiard table, where games of skill and chance were played, or at any other time previous to said first day of December, 1854, within the corporate limits of Iowa City, without having first obtained a license so to do, or in any other manner whatever.

"3. And this defendant denies that it is contrary to any ordinance of Iowa City, to keep a billiard table, on which games of skill or chance are played, within the corporate limits of Iowa City, without first having obtained a license so to do; he therefore prays judgment, and for his costs."

To the first and third paragraphs of this answer, the plaintiff demurred, for the reason, that those portions of the answer show no substantial cause of defence. This demurrer was sustained by the mayor. The defendant refused to amend, and the parties went to trial on the issue joined, and the court, after hearing the evidence, found for the plaintiff, and rendered judgment against the defendant for the sum of \$100 and costs. From this judgment, the defendant sued out a writ of error; the affidavit for which, among other things, recites: "The court thereupon proceeded to try said cause upon the issue joined, this affiant objecting that there was no ordinance of Iowa City in force, at the time of the commencement of this suit, whereby he became liable in manner and form as alleged in said petition, having produced the ordinances of said city in proof thereof, and showing that the ordinance on which plaintiff relied for a recovery, had never been signed by the mayor of Iowa City, as by the charter of said city, in such case made and

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provided, and that the same was not in force. In his return to the writ of error, the mayor, in reply to the foregoing portion of the affidavit, states, "that while the cause was being heard on the evidence, the said defendant *did not* object that there was no ordinance of Iowa City in force at the time of the commencement of the suit, whereby he became liable in manner and form as alleged in said petition; nor did the said defendant, on the hearing of said cause, offer the said ordinances of said city in evidence, in proof that the ordinance was not in force, and showing that the ordinance on which the plaintiff relied for a recovery, had never been signed by the mayor of Iowa City, as is alleged in the affidavit of the said Peter Conboy. It is admitted that the record of the ordinance had not been signed by the mayor, although it is claimed, that the original draft was properly attested. The errors assigned in the affidavit for the writ of error, are as follows:

1. The court erred in overruling the demurrer of affiant to amended petition of plaintiff.

2. In sustaining the demurrer of plaintiff to first and last paragraphs of answer of affiant.

3. In rendering judgment against affiant, without any warrant of law, and contrary to the ordinance of said Iowa City, and the laws of the land.

4. In rendering judgment against affiant, when there was no ordinance of said city in force, authorizing said proceeding.

On the hearing in the District Court, the judgment of the mayor was reversed, and judgment rendered for costs against the city. The city appeals to this court, and assigns the following as error:

1. The court erred in reversing the judgment of the mayor.

2. In not quashing the writ of error.

3. The court had no jurisdiction of appeals or writs of error from the judgment and decisions of the mayor of Iowa City under the city ordinances.

W. Penn. Clarke (city attorney), for the appellant.

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J. D. Templin, for the appellee.

ISELL, J.—The first question in the proper order of considering this case, is that raised by the third assignment of error, namely: "The District Court *had* no jurisdiction of appeals or writ of error from the judgment or decision of the mayor of Iowa City under the city ordinances." From the fact that by the charter of the city (Laws of 1853, 101, § 12), the mayor is vested with *exclusive original jurisdiction, for the violation of the ordinances of the city*, and by section 13, appeals are allowed from the judgment and decisions of the mayor to the District Court, in the *same cases*, time and manner as may at any time be allowed by law from those of other justices, it is contended, that in those cases where the mayor has exclusive original jurisdiction, there is no appeal. Stress is laid upon the words *same cases*, and it is claimed that the judgment in no other cases than those which may be tried by other justices than the mayor, may be appealed from. We do not, however, conclude that this was the intention of the legislature. The giving to the mayor exclusive *original* jurisdiction, implies that he is not to have exclusive jurisdiction, or final jurisdiction, but that a review is contemplated. If so, of consequence, by the District Court. In the case of *The City of Dubuque v. Rebman*, 1 Iowa, 444, this question was substantially considered; and it was held, that notwithstanding an appeal was not expressly given, an appeal lay from the judgment of a justice for a violation of a city ordinance. The language of the charter, section 13, "Appeals to the District Court in the same county, shall be allowed from the judgments and decisions of the mayor, in the same cases, time and manner, as may at any time be allowed by law from those of other justices, and they shall be tried as other cases," we do not regard as restrictive, but as intending to confer a general right of appeal. At present, any person aggrieved by the final judgment of a justice, may appeal (Code, § 2328), in a civil case, within twenty days, by filing a bond, &c.; but in case of a misdemeanor, this right is restricted. As the law now stands, we

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understand the charter to mean, that appeals from the final judgment of the mayor, may be taken by any person aggrieved, but in similar cases they must be taken in the same time, and in the same manner, as from a justice. We conclude that the plaintiff can take nothing by the third assignment. The first error assigned in the affidavit for the writ of error to the mayor, is, that the court erred in overruling the demurrer to the amended petition. There is nothing in the record showing the ground of this demurrer, and therefore the District Court, or this court, would not be justified in disturbing the judgment of the mayor, on that account.

The other errors assigned in the affidavit, resolve themselves into the question, did the mayor err in sustaining plaintiff's demurrer to the first and last clauses of defendant's answer? These clauses are substantially, that there was no ordinance in force whereby defendant was liable; in effect, denying the existence of the ordinance. We hold that the mayor was authorized to take judicial notice, *ex officio*, of the city ordinances. The presumption on this question, as others, is in favor of the correctness of his decision. If he erred, the party wishing to bring his decision in review, should have the grounds of his ruling so put upon the record, as to show the error. There is nothing of record, to repel the presumption of the correctness of the decision of the mayor in this particular. But from the admissions of the plaintiff, and the whole tenor of the record, we conclude that the ruling of the District Court, was based upon the idea that the ordinance under which the suit was brought, had not taken effect. It is admitted, that the *recorded copy* of the ordinance had not been signed by the mayor. This admission shows, that the original draft of the ordinance after its passage, was *signed by the mayor*, and attested by the recorder, and published for ten days or more, in the Iowa Capital Reporter, a newspaper published in the city. The ordinance had been also recorded in a book kept for the purpose of recording ordinances, and attested by the recorder, *but not signed by the mayor*. And the question is,

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was the signature of the mayor to the *recorded copy*, essential to the taking effect of the ordinance?

The language of the charter is as follows: "Ordinances passed by the city council, shall be signed by the mayor, attested by the recorder, and before they take effect, be published in one or more newspapers, published in the city, at least ten days; and if there be no such newspaper, they shall be posted up in each ward the same length of time. They shall also be recorded in a book to be kept for that purpose, and signed by the mayor, and attested by the recorder." The requirements of this section, preceding the period, relate to the publication of ordinances, and are essential to their taking effect. But those following, relate to the preservation of the ordinances, and we are inclined to hold that they are simply *directory*; and that the signature of the mayor to the copy of record, was not essential to the taking effect of the ordinance. We hold, therefore, that the court erred in reversing the decision of the mayor.

Judgment reversed and cause remanded.

DAVIS, Pros. Attorney, v. BEST.

Where in a proceeding by *quo warranto*, the information commenced as follows: "Your informant, Wm. P. Davis, Prosecuting Attorney of the county of Lucas;" *Held*, That the information was properly styled, under section 2152 of the Code, which provides that such information may be filed by the *district attorney* of the proper county.

An information filed by the proper prosecuting attorney, in his official character, requires no other verification than his official signature.

The August election is established by law, and the time it is held, should be judicially taken notice of.

A county judge, elected at an April election, to fill a vacancy, occasioned by the removal of his predecessor before the expiration of his term of office, does not acquire the right to hold the office for the term of two years.

The words "two years" in section three of the act entitled "An act to require county judges to give bond," approved January 29, 1853, are to be taken in contradistinction to the words "four years" in section 103 of the

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Code, creating the office of county judge, and are not intended to apply to the filling of vacancies in that office, or to alter the law on that subject. A county judge elected to fill a vacancy, is only entitled to serve out the unexpired term of his predecessor.

Appeal from the Lucas District Court.

THIS was an information in the nature of a *quo warranto*, filed by the prosecuting attorney of Lucas county, to oust William C. Best from the office of county judge, who was elected at the April election, 1855.

The plaintiff claims that said Best, was elected to fill a vacancy occasioned by the removal of one Wescoat, who had formerly held that office, and that the term of office expired on the election and qualification of one Francis Savacool, who was elected to that office at the August election, 1855. The information alleges, that the defendant is "unlawfully holding and exercising the office of county judge for the county of Lucas," and sets up that Savacool, who claims the office, received a majority of all the votes of the electors of said county, cast at said August election for the office, and that the canvassers for said county declared him elected; that he gave bond, and received a certificate of election, and was qualified, all in pursuance to law in such cases provided; and afterwards demanded the books and papers of the office; and that defendant refused to deliver them, &c. To this information, there was a demurrer filed and sustained by the court, for the following causes:

1. That the information does not state that Wm. P. Davis is the district attorney of the proper county, or that Jacob C. Best is holding any office in the state of Iowa, and is not subscribed and sworn to.

2. Said information does not state on what day the election was held, at which Savacool was elected county judge; or that said election was held pursuant to law; or that he received a majority of all the legal votes cast; or when the canvassers declared said Savacool elected; or for what term, or how long.

3. Said information does not state the time when, or the

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manner in which, said Savacool executed his bond, or received his certificate of election, and was qualified or demanded the books, papers, &c.

4. Said information is not accompanied with an abstract of the election therein referred to, or other exhibit.

5. Said information shows that Best was elected at the April election, 1855, and he thereby acquired a right to hold the office two years.

Judgment having been rendered for the defendant on the demurrer, the plaintiff appealed, and assigns for error, the decision of the court below.

W. Penn. Clarke, for the appellant.

J. E. Neal, for the appellee.

ISBELL, J.—With regard to the points made under the first division of the demurrer, we think that the demurrant has misapprehended the record, except as to the last specification in this division. The style of the information is: "Your informant, Wm. P. Davis, *prosecuting* attorney of the county of Lucas." It is true, that the Code, § 2152, uses the term "district" attorney, but there can be no doubt that *prosecuting* attorney was intended, as there was not at the time of its adoption, nor has there since been, *technically*, any "district" attorney of the proper county. The information does clearly state, that Best is unlawfully holding and exercising the office of county judge for the county of Lucas. And so far as it is objected, that the information is not sworn to, we hold that an information filed by the proper prosecuting attorney, in his official character, requires no other verification than his official signature.

Under the second division of the demurrer, it is objected that the information does not state, on what day the election was held. It is stated that Savacool was elected at the August election, A. D. 1855. The August election is established by law, and the time it is held should be judicially taken notice of. We think there is nothing in this objection.

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As to the other objections urged in the second and third divisions of the demurrer, we regard them as either frivolous, or not sustained by the record. The fourth division is based upon the idea, that an abstract of the returns of the election should accompany the information. We know of no provision of the law requiring this.

This brings us to the last specification in the demurrer, which raises the substantial question in the case, namely, does a county judge, elected at an April election, to fill a vacancy, occasioned by the removal of his predecessor before the expiration of his term of office, acquire the right to hold the office for the term of two years? The determination of this question, involves a construction of the law creating that officer, as modified by a subsequent statute. The provisions of the statute which are deemed material in the determination of this question, are the following: By the Code, § 103, it is provided: "The county judge shall be elected at the first election holden in August, after this statute has been in force thirty days, and if such election does not take place in the year 1851, the county judges elected in 1852, shall hold for the term of three years, and a new election shall take place at the August election, in the year 1855, and every four years thereafter." By section 240, it is provided that "the following shall be the years of the election, and the terms of service of the respective officers. In the year 1851, at the August election, in each county, a county judge for the term of four years," &c. "But if this statute be not in force on the day of the above election, then an election shall take place for a county judge, and a supervisor of roads, in each county, at the general election in the year 1852, the county judge to hold for three years, and the supervisor for one year, and until their respective successors are elected and qualified; and a supervisor shall be again elected in the year 1853, and each two years thereafter, and a county judge in the year 1855, and each four years thereafter," &c. By section 434, it is provided, that "vacancies occurring in county or township officers, shall be filled at the first election which takes place in April or August, after

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the expiration of fifteen days from the occurrence; and when a justice of the peace is elected to fill a vacancy, he is entitled to hold for the term of two years from the time of his election," &c. By the act approved January 29, 1853, after providing that county judges then in office, should within sixty days after the taking effect of the act, give a bond, or forfeit their offices, it is provided by section 8, that "county judges hereafter elected, shall hold their offices for the term of two years, and until their successors are elected and qualified." It is contended by defendant, that this act is intended to apply to all county judges elected after the taking effect of this act, whether to fill a vacancy on account of an unexpired term, or otherwise.

On the part of relator, it is contended, that the words two years, in the act of 1853, are only to be taken in contra-distinction to the words *four years* in the provision of the Code creating the office; and are not intended to apply to the filling of vacancies, or to alter the law on that subject. The construction contended for by the defendant, has the *letter* of the act to favor it; and also derives some additional strength from the fact, that the legislature had, in the same act, provided a contingency, whereby all the offices of county judge in the state, might by possibility become vacant, without specifying the length of time those elected to fill such vacancies should hold, unless they were to hold for two years; yet, in view of all the legislation upon the subject, and the duties devolving upon the county judge, we are constrained to hold the construction contended for by the relator, the true one. From the provisions of the *Code*, above quoted, it is apparent that it was the intention of the legislature, in adopting them, that the office of the county judge should be *regularly* filled at the August election. There is a peculiar propriety in this provision, arising out of the duties devolving upon that officer. He is the accounting officer of the county. He audits and settles the accounts of the treasurer, and those of any other collector of county revenue, taxes, or incomes. He is the superintendent of the fiscal concerns of the county. It is his duty, on the first Monday of *July*,

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annually, to cause to be made a minute statement of them for the preceding year. By the various provisions of the law regulating the collection of revenue, at that time, the accounts with the treasurer of the county, and other fiscal officers, are as nearly wound up, and the business of the office as little complicated, as may be. Again, by the provisions of the law, in the ordinary course of the business of the office, little occurs to render the accounts of the office complicated, between the first Monday in July and the time a successor, elected in August, must qualify. The whole system of county finance appears to have been framed, with an eye to the termination of the duties of that officer. And from hence, we discover the reason why the legislature, in adopting the Code, was so particular in providing that, in case the election of county judge should not take place in the year 1851, the county judges elected in the year 1852 should hold for three years, and that a county judge should be elected at the *August* election in 1855, and every four years thereafter. By construing the words *two years*, in the act of 1853, to apply to the regular term of the office, and not applying to vacancies, the harmony of the system is preserved. We think the legislature did not intend to provide for vacancies by the act of 1853, but only to shorten the regular term of office from four to two years. We hold, therefore, that a county judge, elected to fill a vacancy, is entitled to serve out the unexpired term of his predecessor only, and hence the demurrer was improperly sustained.

Judgment reversed and cause remanded.

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The general settled rule of damage, both in England and the United States, for failing to deliver goods at a specified time and place, where the price is not paid before the time for delivery, is the difference between the contract and the market price, at the time delivery should have been made.

Where the price of the commodity contracted for, has been paid prior to the

2	101
99	488

2	101
117	629

2	101
123	506

2	101
136	383

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time for delivery, a somewhat different rule obtains; and, in such case, the plaintiff is not confined in his recovery, to the difference between the contract and the market price on the day of delivery, but may recover the highest market price between the day for delivery and the time suit is brought, provided the plaintiff does not unreasonably delay the institution of his suit.

A party contracting to deliver goods at a specified time and place, where no express stipulations enter into the contract, to vary his liability, may be fairly presumed to have contracted with reference to these general rules.

It is not competent to enlarge a written contract by parol evidence, or by special pleading.

Where a party contracted to deliver, at a specified time and place, a certain quantity of pine logs, at a given price; *Held*, In an action on the contract, that there was nothing in the contract which tended to show, that any other than the ordinary liability was stipulated for.

Appeal from the Scott District Court.

THIS was an action on the following contract: Memorandum of agreement made and entered into this 12th day of August, 1854, between W. H. C. Folsom, of Minnesota, of one part, and J. M. Cannon, of Davenport, Iowa, of the other part. The said W. H. C. Folsom agrees to deliver to the said J. M. Cannon, in the river opposite his mill at Davenport, or at Le Claire, on or before the 10th of September next, eight hundred and forty-three thousand and three hundred and twenty-three feet of pine logs at the St. Croix scale, now in the Mississippi River, on their way down, for which the said Cannon agrees to pay him at the rate of fifteen dollars per thousand feet, as follows: "Five thousand dollars in hand, which is hereby acknowledged to be received, and the balance on the delivery of the logs, as aforesaid. W. H. C. Folsom." Indorsed as follows: "If these logs should not be delivered, for any reasonable detention, for fifteen days after the time specified, no advantage will be taken of that delay. J. M. Cannon."

The plaintiff, in his petition, avers that he had advanced \$6,565 on the contract, and that defendant had delivered only 859,903 feet of logs. Plaintiff also avers, that he was the owner of a sawmill at Davenport, and that defendant knew it; that he purchased the logs for the purpose of saw-

ing them into lumber at said mill; that *after* the breach of said contract, the price of logs rose to eighteen dollars per thousand, and that plaintiff, after the breach, could not obtain other logs to saw into lumber, during the fall and winter of 1854, and before the closing of the river, whereby his mill lay idle for the space of six months; and claims, in addition to the money advanced above, the price of logs not delivered, as per contract; for the enhanced price of the logs, three dollars per thousand; and the "*following special damages*." The sum of three thousand five hundred dollars, for the price and value of the lumber into which said logs were intended to be sawed, over and above the cost thereof, and the cost of sawing the same; the sum of five thousand dollars, by reason of said mill of plaintiff's lying idle for want of said logs, and the wages of laborers, to take care of and preserve the saws, when lying idle. To so much of the petition as "*seeks to recover special damages*," defendant demurred; and the court sustained the demurrer, ruling that "*special damages are not recoverable in this case*." From this ruling, plaintiff appeals, and assigns the same as error. The petition does not show at what time, nor under what circumstances, the additional advancement above the \$5,000 mentioned in the contract, was made.

Whitaker & Grant, for the appellant:

The general rule of damages upon a contract to deliver goods, where the vendee has paid the money in advance, is, that the plaintiff may recover the highest price of such goods, between the time of delivery and the time of trial. 2 Greenleaf's Evidence, § 261; *West v. Pritchard*, 19 Conn. 212. The general rule is, that the plaintiff recovers the difference between the price paid and the market value at the time of the breach; but there are cases where the plaintiff recovers the profits which would accrue, if the party had performed his contract. *Dunlap v. Higgins*, 1 House of Lords Cases, cited in 8 Livingston's Law Mag. 613, was a case where such profits were allowed; and in which the court say:

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"What does the party come into court for? To obtain compensation for the other party's not having performed his contract. The jurors had to ascertain the damages which had arisen from the non-fulfillment of this contract. Suppose a party, who has agreed to purchase a certain quantity of iron on a particular day, has himself entered into a contract with somebody else, conditioned for the supply of the same quantity of iron to be then delivered; and that he, not being able to obtain the quantity contracted for on that particular day, loses the benefit arising from the sub-contract. Assuming that the market price of iron had risen in the meantime, the plaintiffs ought not only to recover the difference between the contract and the market price, but also that profit which would have been received, if the party had performed his contract." "No other," proceeds Lord Cottenham, "is reconcilable with justice, nor with the duty which the jury had to perform, that of deciding the amount of damages which the party had suffered by the breach of the contract. Most cases of contract vary from each other; and whatever general rules there may be as to awarding damages, they must be modified by the particular cases to which they come to be applied." In *Sedgwick on Damages*, 76, it is said: "Some of the earlier cases have gone too far, and profits are sometimes recovered. Where contracts are made to deliver goods at a particular place, the rule of damages is the difference between the price of the goods, where they are and where they are to be, which is profits."

"Profits or advantages, which are the direct and immediate fruits of the contract entered into between the parties, stand on a different footing from speculating profits. They are part and parcel of the contract itself, entering into, and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which, is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon, before the contract was made, and formed perhaps the only inducement to make it." *Masterton v. Mayor of Brooklyn*, 7 Hill, 62. Profits were allowed on

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the construction of a section of an aqueduct. *Clark v. The Mayor*, 3 Barbour, 288, affirmed 4 Comstock, 338. In the case of *Williamson v. Barrett*, 13 Howard, 111, where one steamboat was run into and damaged by another boat, the plaintiff recovered for the loss of her use, and what she might have earned while detained in making repairs. The court allowed the plaintiff profits, on a breach of a contract for work on a railroad. Actual damages, they say, includes the direct and actual loss which the plaintiff sustained, *prop-ter rem ipsam non habitam*. *Philadelphia W. & R. R. Co. v. Howard*, 13 Howard, 307. See also *Dormel v. Jones*, 17 Alabama, 689. The defendant contracted to furnish plaintiff a certain machine. He delayed furnishing it for three months. The plaintiff was held entitled to recover for the value of the use of a machine. *Singer v. Farnsworth*, 2 Carter, 597. On a breach of a contract for slaughtering hogs, the plaintiff recovered the net profits. *Thompson v. Jackson, Owsley & Co.*, 14 B. Mon. 114. The plaintiff is entitled to recover such profits as would have accrued and grown out of the contract, as the direct and immediate fruits of its fulfillment. *Fox v. Harding*, 7 Cushing, 522.

Profits were allowed as damages in *Waters v. Howes*, 20 English L. & E. R. 410. In *Alder v. Keighly*, 15 Mees. & Wellsby, 117, it is said, "the rule is clear that the amount which the plaintiff would have received, if the contract had been kept, is the measure of damages, if the contract be broken." In *Hadley v. Baxendale*, 26 Eng. Law & Eq. 402, the law is thus laid down: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive, should be either such as may fairly and reasonably be considered as arising naturally, that is, according to the usual course of things, from such breach, or such as may be reasonably supposed to have been in contemplation of the parties at the time they made the contract, as the probable result of it. Now, if the special circumstances under which the contract was actually made, were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from a breach,

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which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach under these special circumstances, so known and communicated." Where defective machinery was put into a mill, the plaintiff was allowed to recover his loss of profits for not running his mill. *Davis v. Talcott*, 14 Barb. 612; *Green v. Marue*, 11 Illinois, 613; *Clifford v. Richardson*, 18 Vermont, 620; *White v. Manly*, 8 Pick. 356; 9 Wend. 325.

In this case, the plaintiff has lost the entire use of his mill, for the time it would have been occupied in sawing these logs. He could not supply other logs; the price not only rose in value (the court says he could not recover that), but they could not be had. If the loss of the use of the mill is not the direct consequence of the breach of the contract, we cannot distinguish between direct and remote. The general rule is modified by the admitted facts, and where the contract is made with regard to special circumstances, and these circumstances communicated by the plaintiff to the defendant, the damages which might be reasonably contemplated, are recoverable. The plaintiff alleges that he owned a saw-mill; it is referred to in the contract; that he bought the logs for the purpose of sawing them; that this was known to the defendant; that the loss of the logs could not be supplied, and that, consequently, the plaintiff's mill lay idle, for all the time it would have been employed in sawing them. Now, if Cannon had employed Folsom to put an engine in his mill by a certain time, or to do certain work on his machinery, and he had not, Cannon could have recovered for all the time his mill lay idle, while the engine was delayed or imperfect. He employed him to furnish him logs, and he neglects to do it, whereby his mill lay idle. Why can he recover in one case, and not the other?

It don't matter with us, whether these damages are called loss of profits or loss of the use of the mill, the rule brings us to the same result. If he could make as much profit by running the mill, it would be because he could saw the logs

into timber, and get the money for it. The result is the same, and the petition is framed to recover the damages in either form.

Cook & Dillon, for the appellee.

The *contract* constituting the foundation of the plaintiff's action in this case, *is in writing*. It is an ordinary contract for the sale and delivery of chattels, at a fixed time, and at a designated place. It is nothing more. Having been reduced to writing, and signed by the parties, and being mutually obligatory and intelligible, it is *conclusively, indisputably, presumed to contain the whole engagements of the parties, and the "extent" and manner of their undertaking*. 1 Greenl. Ev. § 275. Being in writing, *all of the rights and liabilities* of each of the parties, arise from the written instrument, and from nothing else. Outside of the *written* contract, neither party has any *rights*; and outside of, and beyond, the written contract, neither party can be subjected to any liabilities. The plaintiff brings an action on the written contract, and he cannot set out in his petition, as he has sought to do, other facts outside of, and independent of the contract, to *increase or alter the liability* of the defendant, as for instance, that the defendant "knew the plaintiff was the owner of a mill; that he designed to manufacture the logs into lumber," &c. It will be specially noted, that the plaintiff nowhere avers that the defendant knew that the plaintiff could make the *immense profits* sought to be recovered. As a pleading founded on a *written contract*, we will venture to say, that the amended petition of the plaintiff is *without precedent or parallel*, in any law volume, from the Year Books, down to the latest publication. The plaintiff in this action, can only recover on the *written contract*. He can recover on nothing else. Then, why does he allege facts, and can he be permitted to allege facts, outside of the contract, tending to increase the liability of the defendant? If, in this way, he recovers more than he could by declaring on the contract alone, then he recovers on something *additional to the contract*. In that case, to use the language of Mr. Greenleaf, the writ-

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ten contract "would not measure the *extent* and *nature* of the liability" of the defendant. What is the object of that general rule of law, so deeply imbedded in the system of our jurisprudence, which declares that "*extrinsic parol evidence*, is not admissible to vary, contradict, explain or alter the effect of a written instrument?" Let Mr. Greenleaf answer:—"Because it would tend, in many instances, to substitute a new and different contract for the one really agreed upon, to the prejudice of the parties, or one of them."

We say that the plaintiff, in his amended petition, does allege facts "*extrinsic* to the written agreement," to vary the effect of the written agreement, in this, to wit: to increase and augment the defendant's liability thereon; and these *extrinsic*, and so to speak *parol* facts, being alleged, must be proved by extrinsic parol evidence. We say they must be proved by verbal evidence, because the written contract does not prove them; and if these extrinsic facts can be proved by extrinsic testimony, whereby the defendant's liability is increased, what becomes of the rule which says, that the "effect of a written instrument cannot be altered by parol?" It is evaded, destroyed. We say that the plaintiff has alleged facts extrinsic to the writing, to vary its effect, by increasing the defendant's liability. If not, why has he alleged them? Can they be averred for any other purpose? And if for this purpose, can he be permitted to do it?

The only question in this case, is: did the court err in deciding that in the agreement sued on, for the sale and delivery of pine logs, at a fixed time and place, that *what* the law knows as *special damages* were not recoverable? The court will notice that this is an *ordinary* contract, for the *sale and delivery of personal property*, at a *fixed time and place*. Sedgwick on Damages, 260, thus lays down the rule in such cases: "It seems to be *well settled* as a general rule, both in England and the United States, that the measure of damages, is the difference between the contract price and the market value of the article, at the time it should have been delivered," &c. On page 278, after reviewing all the cases, he states their general result, as follows: "That the market

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value or price on the day of the breach, controls the measure of damages." Also, see 2 Greenl. Evidence, § 261; and 2 Kent's Com. 480 (note to 7th ed.), where Judge KENT repudiates the doctrine of recovering profits, and says: "The true rule of damages, is the value of the article at the time of the breach." In New York, the rule has been thus settled, by a great number of decisions,—among which we cite: *Dey v. Dox*, 9 Wend. 129, which is explicit and in point; *Clark v. Pinney*, 7 Cowen, 681; *Davis v. Shields*, 24 Wend. 322; *Beal v. Terry*, 2 Sandf. S. C. 127; where it is said, that, "the true rule of damages is the difference between the contract price and market value, on the 30th of June (the contract time), with interest on such difference." In Pennsylvania, the law is the same. See Sedgwick on Damages, 268, note; 5 Watts & Serg. 106. In Connecticut, the rule is the same. See Sedgwick, 268; 2 Conn. 487; 5 Ib. 227; C. J. Swift's opinion in Am. Com. Law, 89. In Arkansas, the same doctrine is held. Sedgwick, 279, note; *Hanna v. Harter*, 2 Ark. 397. This is the Massachusetts rule. *Shaw v. Nudd*, 8 Pick. 9; 16 Ib. 194. This is the Maine rule. *Smith v. Berry*, 18 Maine, 122, a strong case. This is the Illinois rule. *Smith v. Dunlap*, 12 Ill. 184. This is the rule in Maryland. *Williamson v. Dillon*, 1 Harris & Gill, 444. This is the rule in Kentucky. American Com. Law, 90. Even in California, the rule is the same. *Tobin v. Post*, 3 Cal. 375. This is the Texas rule. 4 Texas, 289. This is the rule adopted in the Federal Courts. *Shepard v. Hampton*, 3 Wheat, 200; *Douglass v. McAllister*, 3 Cranch, 298; 6 Wheat, 109; *Willins v. Consequa*, 1 Pet. 85; Chitty on Contracts (6th ed.), 445, and notes. This is the rule in England. *Gainsford v. Carroll*, 2 B. & C. 624; 9 Eng. C. L. 204; in point. *Boorman v. Nash*, 9 B. & C. 145; 17 Eng. C. L. 344.

The plaintiff, in his amended petition, expressly claims to recover the profits he could have made (?) in manufacturing the logs into lumber. The following cases will show, that both the English and American courts have concurred in disallowing profits as any part of damages to be compensated, both

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in cases of contract and of tort. *Fleureau v. Thornhall*, 2 W. Black. 1078; *Robinson v. Harman*, 1 Ex. Rep. 849; *Schooner Lively*, 1 Gallison, 314; *The Amiable Nancy*, 3 Wheat. 546; *La Amistad de Rues*, 5 Wheat. 385; *Decol v. Arnold*, 3 Dall. 333; *Blanchard v. Ely*, 21 Wendell, 342; *Smith v. Coudrey*, 1 Howard, 28; Sedgwick on Damages, 70 and 71.

ISBELL, J.—There is some difficulty in clearly understanding what was intended by the defendant in his demurrer, by "by special damage," as well as in the ruling of the court, where the same phrase is used. This may mean the damages *especially counted upon* by plaintiff; or it may mean those damages claimed after the words, "*the following special damages*," used in the declaration. From the whole case, we conclude that the latter was intended by the demurrer and ruling. Assuming this to be the matter demurred to, the following are the damages claimed, which were excluded by the sustaining of the demurrer; viz.: the sum claimed as the price of the lumber, into which the logs were intended to be sawed, over and above the cost thereof, and the cost of sawing the same; for the mill lying idle, and for the wages of laborers to take care of and preserve the saws, while the mill was idle.

The general settled rule of damage, both in England and the United States, for failing to deliver goods at a specified time and place, when the price is not paid or advanced before the time for delivery, is the difference between the contract and the market price at the time the delivery should have been made. The authorities cited by defendant are full on this point, and further reference here is deemed unnecessary.

Where the price of the commodity contracted to be delivered, has been paid prior to the time for delivery, a somewhat different rule obtains, and it has been repeatedly held, that, in such case, the plaintiff is not confined in his recovery to the difference between the contract and market price on the day of delivery (*Clark v. Pinney*, 7 Cow. 681; *West v*

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Prichard, 19 Conn. 212; per Marshall, C. J. in *Shepherd v. Hampton*, 3 Wheat, 230; but he may recover the highest market price between the day for delivery and the time suit is brought, provided the plaintiff does not unreasonably delay the institution of his suit. These are well-established rules of law. A party, contracting to deliver goods at a specified time and place, where no express stipulations enter into the contract to vary his liability, may be fairly presumed to have contracted with relation to them. There is nothing in the contract at the foundation of this suit, that tends to show that any other than the ordinary liability was stipulated for. The contract is in writing, and the plaintiff, in his recovery, must be confined to it. It is not competent to enlarge it by parol evidence, or by special pleading. To allow any of the damages excluded by the demurrer, would be to enlarge the contract.

It is laid down by Williams, C. J., in delivering the opinion of the court in *Bush v. Chapman*, 2 G. Greene, 551, that, "if the plaintiff sue on a written or special contract, so as to make it the basis of his action, it must regulate his right to recover, as well as the amount."

We hold, therefore, that the demurrer was properly sustained.

Judgment affirmed.

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Fraud must be proved, and will not be presumed.

Fraud is of various kinds, but generally consists either in the misrepresentation or concealment of a material fact.

The party alleging fraud, should also make it appear that he relied or acted upon the representation made, and that he was vigilant, and not careless, in making the contract.

The surrendering of a note, or the compromise of a suit, is a sufficient consideration for a bond.

In law, the acts of the drunkard are avoided on the ground of incompetency; in equity, on that of fraud.

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As mere moderate drunkenness does not deprive the mind of the power of rational consent, and is not always apparent to others; it does not, of itself, avoid a contract.

In order to avoid a deed or contract, there must be that state of excessive drunkenness which deprives the person of the consciousness of what he is doing; and this excessive drunkenness is a defence, whether voluntary, or caused by the fraud or procurement of the other party to the contract.

But there may be such contrivance or management on the part of one party, to draw the other into drink, and thus to take advantage of his intoxication, as would justify the interposition of a court of equity, on the ground of fraud, even where the drunkenness is less than excessive.

In either case, such intoxication only renders the contract voidable, and not void; and the party, on recovering his understanding, may adopt the same.

Appeal from the Lucas District Court.

THIS is a proceeding in equity to enforce the specific performance of a contract, for the conveyance of a certain eighty acres of land in Lucas county. The contract is under seal, dated February 22, 1850, and binds the respondent to convey the land, so soon as he obtains his patent. The answer of respondent is not very clear in its averments, but the substance of it is, that in the fall of 1849, the complainant professed to have a claim title to certain lands; that he sold the same, or a part thereof, to respondent; that respondent, after entering the same, was to convey the eighty acres in dispute to complainant; that as security for such conveyance, he gave complainant his note for two hundred dollars; that said contract, however, was without consideration; was obtained by fraud and duress; that complainant had no claim on the land, and misrepresented his title. He also avers that the contract of February 22, 1850, was obtained by fraud and misrepresentation, and without consideration, being given to satisfy this note, obtained as above stated. The answer was filed June 21st, 1853, and afterwards, on the 6th of October, 1854, he filed a further answer, setting up that, at the time of executing the last contract, he was drunk, and so under the influence of liquor, that he had no contracting mind, and that this drunkenness was brought about by the contrivance of complainant, with the fraudu-

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lent purpose of obtaining the execution of said contract. Replication in denial of the new matter contained in the answer. After hearing on the pleadings and depositions, the bill was dismissed, and complainant appeals.

The evidence is sufficiently stated in the opinion of the court.

James Baker, for the appellant.

J. E. Neal and *O. L. Palmer*, for the appellee.

WRIGHT, C. J.—The execution of the bond of February 22, 1850, is not denied, but is sought to be avoided, so far as now insisted upon in argument, on three grounds: *first*, that it was given without consideration; *second*, that it was obtained by fraud; and *third*, because the respondent, at the time of the execution of it, had not a contracting mind.

The consideration for the sale of this land, is not mentioned in the bond. The instrument is a specialty, however, and, as such, imports a consideration. Such being the case, the burthen of proof is upon respondent, as to this defence, as well as the others. And in this proof, we think, he has entirely failed.

Under the statute of 1843, as well as the Code, the consideration of such an instrument may be impeached. But such an allegation, being in the nature of a plea in avoidance, must be sustained by proof. This proof has not been made. What were the terms of the original contract, or what the consideration for the note, are left entirely vague and uncertain by the respondent's proof. There is nothing to sustain the averment, that the complainant had no claim on the land sold. But aside from this want of proof on the part of respondent, the complainant proves affirmatively, that, in addition to releasing to respondent all right to said quarter section, he also let him have his claim upon another forty acres of timber, and was to, and did, show and point out to respondent, a quarter section of prairie subject to entry. Respondent entered the quarter of timber, got complainant's

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claim on another forty, and had his assistance in selecting a prairie tract, either of which would be a consideration sufficiently valuable to sustain the contract. There is, then, not only an absence of proof to sustain this part of the answer, and the presence of proof to show a consideration, but, as we shall see hereafter, in the consideration of the other defences, respondent repeatedly spoke of the land in dispute as complainant's, and of his intention to make a deed, so soon as he obtained his patent. So that, if the burden of proof was different, we should be constrained to find this issue for complainant. So, also, while it is clear that fraud on the part of the complainant in obtaining the contract, would avoid it, yet such fraud must be proved, and will not be presumed. Fraud is of various kinds, but generally consists in the misrepresentation or concealment of a material fact. It should also appear, that the party injured relied or acted upon the representation made, and that he was vigilant, and not negligent, in making the contract; for it is the vigilant, and not the careless, that equity, as well as the law, protects. In this case, there is not even testimony to show that the complainant made any misrepresentations at the time the note was given, or such as would amount to fraud. But if this had been proved, no proof is made that respondent relied upon such representations, or that he exercised any diligence to inform himself as to the nature of complainant's claim.

But, aside from these considerations, the execution of the bond removes all question as to the consideration and fraud connected with the note. Respondent had the ability to contract, at the time he gave the note. It was outstanding, and as such, was a subsisting liability against him. To have this given up, and to compromise or avoid any suit that might be brought, would be a sufficient consideration for the bond, without reference to any antecedent circumstances. But it is claimed, that this was obtained by fraud, and (which is the same thing in equity), when the respondent had no contracting mind, by reason of his intoxication. As it is not claimed, and could not be under the proof, that

complainant misrepresented or concealed any material fact, at the time the bond was executed, but that the fraud as to this part of the transaction, consists in procuring the contract when the respondent was drunk, we shall consider it alone in that view.

In law, the acts of the drunkard are avoided on the ground of incompetency; in equity, on that of fraud. But as mere moderate drunkenness does not deprive the mind of the power of rational consent, and is not always apparent to others, it should not of itself avoid any deed or contract. In order to avoid the deed or contract, there must be that state of excessive drunkenness which deprives the person of the consciousness of what he is doing. This is the modern English doctrine, and that followed by the courts of this country, as well as of France. Ray's Med. Ins. of Ins. § 450; Story's Eq. Jur. § 231. And this excessive drunkenness is a defence, whether voluntary, or caused by the fraud or procurement of the other party to the contract. 2 Greenlf. Ev. § 374. But there may be such contrivance or management on the part of the plaintiff, to draw the party into drink, and thus to take advantage of his intoxication, as would justify the interposition of a court of equity, on the ground of fraud, even where the drunkenness is less than excessive. Story's Eq. Jur. § 231. In either event, such intoxication only renders the contract voidable, and not void, and the party, on recovering his understanding, may adopt the same. Story on Cont. § 27; *Reiniker v. Smith*, 2 Har. & John. 423; *Reynolds v. Waller's Heirs*, 1 Wash. 164. In this case, but one witness swears to the intoxication, and he admits that he and complainant are not on friendly terms. All that he states, however, as to the respondent's condition at the time the bond was executed, is, that "he was drunk, and not in a situation to transact business aright." This is a mere opinion of a witness, and giving it all the weight that could be claimed, would fall far short of establishing that drunken condition, which would avoid the bond. But this same witness testifies, that the bond was brought to respondent's house by one Wilson, and that he urged him to

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execute it, gave him liquor to drink, and then went with him to complainant's residence, where they had more liquor, and the bond was then executed. Another witness testifies, however, that he wrote the bond for respondent, and at his request; that respondent came to him for that purpose, with one McClung, and that they took the same away with them. He also states that he understood, at the same time, that the bond was to be executed for the purpose of redeeming a note of two hundred dollars, which Mansfield held against respondent. But the whole force of the testimony of the witness who speaks of the intoxication, as well as all the defences set up by the respondent, are abundantly negatived and disproved by several other witnesses, and, indeed, by all the circumstances.

At no time does it appear, that respondent exercised any acts of ownership over this land, notwithstanding he admits that he entered it before he gave the bond, and procured his patent before the bringing of the suit. It does appear, however, that complainant has used and treated the same as his property, without objection, as far as shown, on the part of respondent. It also appears that respondent entered the quarter section of timber, of which this eighty is a part. In March, 1852, he made out under oath, for the assessor, a list of his property, in which he included his half of the quarter, but omitted that now claimed by the complainant. In the spring or summer of the same year, he said to another witness, who spoke to him, at Mansfield's request, about the deed, that he designed sending for his patent that week, and when the messenger returned, he would make the deed. In October, 1852, he stated to another witness, who made out a deed at Mansfield's request, and tendered it to respondent for execution, that he would make the deed so soon as he obtained his patent; that he had understood that complainant had been told, that he would never make him a deed, but that he would, when he received his patent; that he always considered the land as complainant's, and to prove it, referred to the fact that he had never assessed it as his own. These circumstances, and repeated declarations, made and

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transpiring months and years after the bond was executed, if not inconsistent with the claim that respondent was incapable of contracting, at least establish the fact that he did, in his sober moments, adopt and recognize the validity of his contract. And if, in addition to these things, we consider that he never, until about the time of bringing this suit, refused to make the deed; that he has at no time pretended to disprove his contract; that he still retains the notes which he admits he received at the time he made the bond, and has thus failed to place the complainant in as good a condition as he was before he parted with the note; it appears to us that this agreement was fair and *bona fide*, and founded upon a good consideration; that there was no such drunkenness as should avoid it in equity, on the ground of fraud, or if so, that it was subsequently adopted; and that it should, therefore, be specifically performed by respondent.

The decree is accordingly reversed, and cause remanded, with instructions to the court below, to enter a decree in accordance with this opinion.

USHER v. LIVERMORE.

In order to authorize a court of equity to treat an absolute deed as a mortgage, it is necessary to show a debt existing between the parties at the time of the transaction, and that the title to the land passed from one to the other. Where, in a suit in equity to obtain title to certain real estate, the bill alleged that the complainant purchased a claim on the land in 1840, and continued in possession until about 1850, most of the time, by himself or his tenants; that in 1846, being unable to enter the land, he caused the respondent to enter it; that this was done in order to get farther time to pay for the land; that to effect their object, the parties entered into an agreement or lease, on the 10th of October, 1846, by which the respondent leased the land to the complainant for the term of three months, and the latter agreed to pay all taxes, and a rent of ten dollars at the expiration of the term, and to yield possession, and which lease further provided, as follows: "And the said Livermore agrees, that if the said Usher shall pay the further sum of \$100, in land office money, then he will make the said Usher a quit claim of said land and warrant against his own acts; all said money to be paid at the ex-

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piration of this lease. And it is expressly understood, that if either party shall not keep all the covenants aforesaid, then the above is to be forfeited;" and that the transaction was a loan of money by the complainant from the respondent, and it was agreed that the latter should enter the land and take the title in his own name, for the purpose of securing the repayment of the money; and where the answer denied that the transaction was a loan to enable the complainant to enter the land, and insisted upon the terms of the contract; *Held*, that time was of the essence of this contract; and that to give the contract any vitality, after the time prescribed, at least, if not before, there should be a power of enforcing it against the complainant as well as the respondent.

Appeal from the Jackson District Court.

THIS is a bill in equity, to obtain title to the west half of the southwest quarter of section thirty-six in township eighty-five, north of range two, east of the fifth principal meridian. The bill alleges that Usher purchased what was called by the early settlers, "a claim" to this land, in 1840, or thereabout, and that he continued in possession until about 1850, most of the time, by himself or his tenants. In 1846, being unable to "enter" the land at the land office, he caused the respondent to enter it; that this was done in order to get farther time to pay for the land; that, to effect their object, they entered into an agreement or lease, on the 10th of October, 1846, by which Livermore let the said land to Usher for the term of three months, and he agreed to pay all taxes and a rent of ten dollars at the expiration of the term, and to yield possession: "And the said Livermore agrees that if the said Usher shall pay the further sum of one hundred dollars in land office money, then he will make said Usher a quit claim deed of said land (and warrant against his own acts); all said money to be paid at the expiration of this lease; and it is expressly understood, that if either party shall not keep all the covenants aforesaid, then the above is to be forfeited;"—which writing is signed and sealed by the parties. The bill alleges that the transaction was a loan of money from Livermore to Usher, and that it was agreed that L. should enter the land and take the title

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in his own name, for the sole purpose of securing the repayment of the money.

The answer denies that the transaction was of the nature of a loan, to enable U. to enter the land, but says that U. represented to L. that if L. would enter the land, and give U. a contract like that above recited, U. would raise the money and pay it at the time, or the contract should be forfeited; that L. wished to use his money at the land sales, which were to take place at the next March, and as the promised time of payment suited, he consented, under the express stipulation, that if the money was not then paid, U. should forfeit all right; and that he remained in Dubuque a year or more, and then went to New York (where he resided), taking the contract with him, and leaving no attorney or agent; but says the money could have been paid to P. Smith, at the time it fell due, and he (L.) would have received it at any time while he remained in Dubuque. L. entered the land. Zalmon Livermore is made a party, as a vendee of Martin L. The cause was submitted on the bill, answers, replication and depositions, and a decree rendered, dismissing the bill at the cost of the complainant. The evidence is sufficiently stated in the opinion of the court.

Clark v. Bissell, for the appellant, made the following points:

1. Usher knew not where to pay the money. 2. Livermore should have rescinded the agreement. 3. Livermore acquiesced in the delay of payment. 4. Usher never abandoned, but held to his rights. 5. The proof shows a tender of the money, and demand of a deed. 6. The agreement is, in effect, a mortgage. In support of which, they cited the following authorities: 2 Lead. Cases in Equity, 26, 33; *Remington v. Kelley*, 6 Ohio, 447; *Higby v. Whitaker*, 8 Ohio, 198, and authorities there cited: 2 Story's Equity, §§ 771, 776, and note on pages 101 and 102; *Hatch v. Cobb*, 4 Johns. Ch. 559; 4 How. (Miss.) 109.

Smith, McKinlay & Poor, for the appellees. The principal point relied on by defendants, is, that time was of the es-

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sence of the contract, and being so, after so much delay, a court of equity will not compel a specific performance. This point is ably handled in 10 Kinne's Law Compendium, 90, and in 1 Johnson's Chancery Cases, 375, *et seq.*, to which we beg leave to refer. The case of *Benedict v. Lynch*, 1 Johnson's Ch. 370, is so much to the purpose, and the law so ably laid down by Chancellor KENT, that we must refer to the case in full, without making any extracts from it.

Lord Loughborough, in *Lloyd v. Collett*, 4 Brown's Ch. 469, argues as follows: "There is nothing of more importance, than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed, and that it should be certainly known when a man is bound, and when not. It is one thing to say, the time is so essential, that in no case in which the day has been by any means suffered to elapse, the court would relieve against it, and decree performance; the conduct of the parties, inevitable accident, &c., might induce the court to relieve. But it is a different thing to say, the appointment of a day is to have *no effect at all*, and that it is not in the power of the parties to contract, that if the agreement is not executed at a particular time, they shall be at liberty to rescind it." Mr. Perkins, in his edition of Brown's Ch. Cases, makes the following note to the above-named case of *Lloyd v. Collett*: "A mistaken and very injurious practice long prevailed, from the courts of equity considering time as of no consequence, and delay as affording no impediment to decreeing specific performance of agreements. This was supposed to originate in a dictum attributed to Lord Hardwicke, in the case of *Gibson v. Pattison*, 1 Atk. 12, which is now proved to be totally erroneous. See 4 Ves. 689, *et seq.*, and note. The principal case (*Lloyd v. Collett*), seems to be one of the first in which the practice began to be corrected; and the benefit is attributable, in a great degree, perhaps, to Lord Loughborough having detected the error in *Gibson v. Pattison*, which his lordship stated at length in the principal case. A note in 4 Vesey, 720, attributes the first repugnance to follow the previous stream of

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authority to Sir Lloyd Kenyon, M. R." Mr. Perkins then goes on, and states the several cases that have followed the decision of *Lloyd v. Collett*; and that Mr. Sugden, in 5th edition of his treatise on Vendors, 324 to 349, deduces with perspicuity and ability the true principles upon which the courts now proceed: "Where a purchaser permits a long time to elapse, without evincing a fixed, marked intention to carry his contract into execution, he will be left to his remedy at law, although he may have paid part of the purchase money." 1 Sugden on Vendors (6th American, from 10th Eng. ed.), 413, § 15; referring to 4 Vesey, jr., 686, and 13 Vesey, jr., 225. "Nor will he be assisted by equity, where he has made frivolous objections to the title, and trifled, or shown a backwardness to perform his part of the agreement, especially if circumstances are altered. Same, referring to 1 Bro. P. C. 27; 5 Vin. Abr. 538; 4 Vesey, jr., 667; 5 Vesey, jr., 145; 9 Modern, 302; 4 Vesey, jr., 720.

The other cases referred to in 10 Kinne's Law Comp. 90, and 4 Brown's Ch. 469, are 4 Johnson's Ch. 560; 1 Younge & Collyer, 415; Story's Eq. § 776; 4 Vesey, jr., 589 and note; 7 Vesey, jr., 265; 4 Brown's Ch. 497; 5 Vesey, 719, 736, 818; 2 Scho. & Lefroy, 682. We also refer to *Garretson v. Van Loon*, Iowa Legal Inquisitor for September, 1851, 33, decided in the Supreme Court of this state.

WOODWARD, J.—This is not a case of specific performance. The bill prays that the agreement may be declared to be a mortgage, and that Usher may be permitted to redeem, and upon paying the money, may receive the title. There are two difficulties in the way of considering the transaction as a mortgage. *First*. There was no debt in fact existing between U. and L. which we believe to be necessary, in order to enable the court to view it in the light required. *Glover v. Payor*, 19 Wend. 518; *Robinson v. Cropsey*, 6 Page, 480; *Holmes v. Grant*, 8 Ib. 243; *Brown v. Dewey*, 2 Barb. 28. *Secondly*. The title did not pass from U. nor from any one, through his instrumentality or for his benefit. Without this, also, it is difficult to see how the

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transaction can receive the character of a mortgage. The utmost that is pretended, in regard to anything like a title, or right existing in U., is that he had a right under the pre-emption laws. A pre-emption right being something which exists under the laws of the United States, this court has recognized it as the basis of a contract. *Pierson v. David*, 1 Iowa, 23. But this cannot receive consideration in the present case; for it does not appear that U. had such a right. Very likely he might have had it by taking the steps required, in addition to residence; but he does not appear to have done anything to put himself in a position to claim that right. Again, if he ever had this right, it must have been lost in the four or five years' possession of the land, without perfecting the inchoate right by purchase. And last, the purchase does not appear to have been made under the pre-emption laws, in any degree or manner, but L. entered the land, in the usual way of purchase from the United States; so that he got nothing by or under any supposed pre-emption right in Usher. The case seems to be rather, a strong instance of a call on the court to *make* contracts for the parties, or perhaps, to violate them. In any view which can be taken of it, at this period of the transaction, there is a difficulty arising from the want of mutuality. Livermore holds nothing to be enforced against Usher. To give the contract any vitality, *after* the time prescribed, at least, if not before, there should be a power of enforcing it against U. as well as against L. But it is entirely one sided.

And again: it is expressly stipulated that if either party fails to perform all the covenants in the contract, it shall be forfeited. There cannot be any less meaning to this part of the agreement, than that if either party failed to perform as covenanted, his rights under the same should cease. One of the express covenants was, that of payment at the time named; and it is not the province of the court, to change the contract of parties; it must be as they made it. This is not a case to which can be applied the assumed rule, that time is not of the essence of the contract. If this be a rule of law, or of courts of equity, it is one that has a very

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limited meaning, and is to be taken carefully. It means that time simply—that time merely, *as such*, is not. And even with this restriction, whenever this rule has been applied to the question of time *alone*, it has been where the lapse of time was small; where there has been merely a non-compliance at the day; whilst, on the other hand, the cases are numerous, in which this rule has not been applied; or, in other words, which have not been held to come within it. This rule has never been applied, it is believed, where the lapse of time has been long, and when there has been neglect. What is a long time, in this connection, has not been, and cannot well be, defined. This point amounts to this: that when the precise time has been omitted by accident, chance, or misfortune, and the party has shown himself ready and desirous to perform at the earliest day under the circumstances, the precise time shall not be held vital. But if the case shows dilatoriness, neglect, or want of care in performing, the party is not entitled to relief. And why should he be? There can be found in equity, no principle which professes to serve the negligent. And then when the party is relieved, even on the ground above stated, it can be only in a case when full compensation can be made, when both parties can be placed in as good a condition as before, and when there has been no change of circumstances. No law and no case, permits one to lay by and wait his own time and leisure, to determine whether he will perform or not, and then claim and enforce a performance, if things favor it, or throw up the contract, if he so chooses. See 1 Story's Eq. Jur., § 771, and note on page 101, 102; Leading Cases in Eq. 26; *Benedict v. Lynch*, 1 Johns. Ch. 370; *Hatch v. Cobb*, 4 Ib. 559; *Remmington v. Kelley*, 6 and 7 Ohio, 447; *Higby v. Whitaker*, 8 Ib. 198; *Williams v. Champion et al.*, 6 and 7 Ib. 78; *S. C.* in 6 Ham. 169; *Voorhees v. De Meyer*, 2 Barb. 37; *Lloyd v. Collett*, 4 Brown's Ch. 469, Parker's edition, note to this case; Sugden on Vendors, 5 ed. 324, 349, and in 6 Amer. Ed. 413, § 15; 10 Kinne's Law Comp. 90; *Garretson v. Van Loon*, Iowa Leg. Inq. Sept. 1851.

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This is hardly a case to which these remarks apply, and yet the point is urged in it. And assuming the contract to be one to which such remarks would be fully applicable, let us look at the facts. The first and important fact is, that Usher did not pay at the time agreed upon. Now, what is shown to excuse him; to relieve him from the *contract*? He does not *pretend* to have *tried* to pay until in the year 1848 (what precise time is not stated), somewhere from one to two years after his contract expired. It is difficult to find a principle of equity which should relieve him from the effect of this delay, when no pretense of a reason is offered for it. At that time, he went to pay the money to P. Smith, as agent or attorney of Livermore; but Smith had not the papers, and had no authority to give a receipt or a deed, and declined taking the money. It is to be remembered, that the respondent states that the money could have been paid to Smith, *when it fell due*, and it is proved that respondent remained in Dubuque a year or more after the making of the contract, when he returned to New York; and he says, that he then took the papers with him. From this time, 1848, down to January, 1854, the complainant's argument seems to be, that Livermore was not a resident of the state, and he did not know where to find him. He ascertained his address, however, as he supposed, and caused a letter to be written him once, in 1849 or 1850. This reason covers about six years from the attempt to pay the money to Smith, and seven or more from the maturity of the contract. Is it enough? We do not think it is.

But there are other facts. On the part of complainant, it is shown, that during this time, L. had said to a third person that he did not want the land, if he could get his money and interest. Such declarations do not seem to amount to anything which a court can lay hold of, unless they are brought into connection with some further contract, or arrangement between the parties. On the other side, it is shown, that in the spring of 1853, when one Hunting thought of buying the land, he said to Usher that he had heard that he (U.) had given up all idea of redeeming the

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place; to which U. replied, that he had given up all hopes until lately; that there was a lawyer in Dubuque, who told him he could hold it; and that if Hunting did not want trouble, to let the place alone.

Alanson and Abraham Livermore both testify, that about August, 1853, Usher came to the house of the said Alanson, and saw the respondent, Martin L. there, and told him that "he (U.) did not want the land; there was not enough for him and his boys; they had been out West, and liked the country, and wanted to go out there; and if defendant could sell the place for enough to make him a present, if it was but a small one, he should be glad." After this, in January, 1854, Usher makes a formal tender of the money, and demands a deed, which is declined. This is seven years after the money fell due, by the terms of the contract. Then, if Usher had had any title to the land, which he conveyed to Livermore, to which a right of redemption might attach; and if this were a contract opening to a question of performance; and if the case were free from the question of an abandonment, it would be difficult to recognize any right remaining in Usher. And still more difficult is it, taking the foregoing facts into view, showing an unexcused delay, if not a voluntary neglect. See *Stephenson v. Thompson*, 13 Ill. 186; *Perry v. McHenry*, Ib. 227.

The judgment of the District Court is affirmed.

WRIGHT, C. J.—I concur in the conclusion, that the judgment of the court below should be affirmed. I do not understand, however, that the rule, that time is not treated by courts of equity, as of the essence of the contract in actions for specific performance, is an *assumed* one, or of the limited application suggested in the above opinion. And therefore, in so much of the opinion as relates to that subject, I do not wish to be understood as concurring.

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An application to enforce the specific performance of a contract, is always addressed to the sound discretion of the chancellor, guided and governed by the general rules and principles of equity jurisprudence.

In such cases, relief is not a matter of right in either party, but is granted or withheld, according to the circumstances of each case, when such rules and principles will not furnish any exact measure of justice between the parties.

In contracts respecting real property, courts of equity are in the habit of interposing to grant relief to a far greater extent, than in cases respecting personal property; and while, in cases respecting chattels, this jurisdiction is limited to special circumstances, in cases of land contracts it is universally maintained.

In contracts relating to real estate, time may be of the essence of the contract.

But in equity, time is not deemed of the essence of the contract, unless the parties have so treated it, or it necessarily follows from the nature and circumstances of the contract.

Where a contract for the conveyance of real estate contained the following provision: "And it is expressly agreed by and between said parties, that in the event of the non-payment of said sum of money, or any part thereof, at the time herein limited, that then the said D. may elect to consider the contract at an end, and the said Y. shall be considered the tenant of D., holding over the termination of his lease;" *Held*, 1. That time had not been made of the essence of the contract, by the express stipulation of the parties. 2. That this provision cannot, of itself, be construed as making time material, without some evidence that the vendor elected so to treat it.

Where in a suit to enforce the specific performance of a contract to convey real estate, there was nothing showing any change in the value of the land; or that in the period intermediate between the sale and the offer to pay, there was any change of circumstances affecting the rights, interests or obligations of the parties; and where the vendee proposed to pay the consideration, and brought suit to compel a conveyance of the land, and had contracted to pay the highest rate of interest, before the vendor indicated any intention of declaring the contract at an end; *Held*, That there was nothing to justify the conclusion, that the contract was forfeited by the non-payment of the money, on the day it became due.

Where in a suit to enforce the specific performance of a contract to convey real estate, the bill alleged that the vendor was continuously a non-resident of the state; that at the time the notes became due, neither he, nor any person for him, was at the place of payment, to demand payment; that the vendor has neither returned the notes of the vendee, nor given him notice of his election to consider the contract at an end; that within three months after the last note became due, the vendee, at the place where the notes

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were to be paid, and to the person who acted as the agent of the vendor in making the contract, offered to perform the contract on his part, and demanded a deed; and that said agent refused to perform said contract, and there was no other person there to perform the same; and where the vendee, within six months after such offer to perform, instituted suit to enforce the contract, and brought his money into court; *Held*, That the vendee had not been guilty of such negligence in his offer to pay the purchase money, as to forfeit all right to claim a specific performance of the contract.

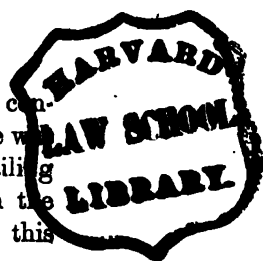
A party seeking to enforce the specific performance of a contract to convey real estate, is not required to tender a deed to the respondent for execution, before bringing his suit.

Where in a suit for the specific performance of a contract to convey real estate, the bill alleged that the notes for the purchase money were to be paid at a specified place; that the vendor was a non-resident of the state, and had revoked the power of his agent to receive the money; that the vendee applied within a reasonable time after the maturity of the notes, at the proper place, to pay them, and demanded a deed; and that there was no person there to receive the one, or execute the other; *Held*, That the vendee was not bound to follow the vendor, in order to proffer to him in person, a performance of the contract, and that he was excused from making a tender of the purchase money, before the commencement of the suit

Appeal from the Scott District Court.

THIS was a petition for the specific performance of a contract relating to the sale of certain land. To this there was a demurrer, which was overruled, and the respondent failing to answer, a decree was entered in accordance with the prayer of the petition. Respondent appeals, and in this court relies upon the sufficiency of his demurrer.

The material averments of the bill are as follows: On the 10th day of July, 1852, complainant made a contract in writing with the respondent, for the purchase of land. Respondent was then a non-resident of the state, and so continued until the time of bringing this suit, being a resident of the state of New York. The contract was signed and executed by one McGregor, as the attorney of said respondent. For the land, complainant was to pay two hundred dollars, for which he gave his notes of one hundred dollars each, due in one and two years, with interest at ten per cent. from date, payable to said respondent, at the office of his said attorney, in the city of Davenport. The conditions of the



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bond are as follows: If the said William J. Young shall pay the said notes at maturity, and shall, in the meantime, pay all taxes on said land, and said Francis Daniels shall, upon completion of said payments, make, execute and deliver, or cause to be made, executed and delivered, a good and sufficient deed to the said Young for said tract of land, then this obligation to be void; otherwise to remain in full force and virtue; and it is expressly agreed, by and between said parties, that in the event of the non-payment of said sum of money, or any part thereof, at the time herein limited, that then the said Francis Daniels may elect to consider the said contract at an end, and the said Young shall be considered the tenant of Daniels, holding over the termination of his lease."

The petition admits that the notes were not paid at maturity, but avers that neither the respondent, nor any person for him, was at the office of the said attorney to demand payment. It also avers, that the respondent has neither returned complainant his notes, nor given him notice of his election to consider the contract at an end, and that on the 11th of October, 1854, at the office of the said McGregor, he offered to specifically perform said contract on his part; offered to pay the money due, and demanded a deed; that respondent was not present; that his attorney refused to perform the contract; that the said attorney's authority had before that time been revoked; and that no other person was there to perform said contract for respondent. The petitioner offers to pay, and avers that he brings into court the money due on said notes, and asks that respondent be decreed to specifically perform the contract on his part. This action was commenced April 7, 1855.

G. C. R. Mitchell, for the appellant.

Whitaker & Grant, for the appellee.

WRIGHT, C. J. To reverse this decree, respondent insists, under his demurrer: *First*, that time was of the essence of the

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contract between these parties, and that the bill shows such default on the part of complainant in making payment, as releases the respondent from any obligation therein; *second*, that the bill does not aver the tender of a deed to respondent for execution, before suit brought; *third*, that no such tender of the amount due on the bond is stated, as entitles complainant to a decree.

An application to enforce the specific performance of a contract, is always addressed to the sound discretion of the chancellor, guided and governed by the general rules and principles of equity jurisprudence. *Shaw v. Livermore*, 2 G. Greene, 343; Story's Eq. Juris. § 742. In such cases, relief is not a matter of right in either party, but it is granted or withheld, according to the circumstances of each case, when such rules or principles will not furnish any exact measure of justice between the parties. Neither can any rules or principles be laid down, which will be of absolute obligation or authority in all cases. In contracts respecting real property, however, courts of equity are in the habit of interposing to grant relief to a far greater extent, than in cases respecting personal property; and while in cases respecting chattels, this jurisdiction is limited to special circumstances, in cases of land contracts, it is universally maintained. Story's Eq. Jur. § 746.

In reference to such contracts, also, there can now be no doubt, but that time may be of their essence. Says Story, J., in *Taylor v. Longworth et al.* (14 Pet. 172): "Time may be made of the essence of the contract by the express stipulations of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or purchaser." And even when time is not thus expressly or impliedly of the essence of the contract, if the party seeking a specific performance has been guilty of gross *laches*, or has been inexcusably negligent in performing the contract on his part; or if there has, in the intermediate period, been a material change of circumstances, affecting the rights, interests or obligations of the parties; in all such cases, courts of equity will refuse to decree any specific per-

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formance, upon the plain ground, that it would be inequitable and unjust. But, except under circumstances of this sort, or of an analogous nature, time is not treated by courts of equity as of the essence of the contract; and relief will be decreed to the party who seeks it, if he has not been grossly negligent, and comes within a reasonable time, although he has not complied with the strict terms of the contract. But it is also true, that in all such cases, the complainant should make out a case free from doubt; show that the relief asked is equitable under the circumstances, and account in a reasonable manner for his delay, and any apparent omission of duty. Time is, however, not deemed, in equity, of the essence of the contract, unless the parties have so treated it, or it necessarily follows from the nature and circumstances of the contract. Story Eq. Jur. § 776; *Brashin v. Graty*, 6 Wheat. 528; *Mathews v. Gilliss*, 1 Iowa, 242; *Brumfield v. Palmer*, 7 Blackf. 227. Let us now apply the foregoing general doctrines to the facts of this case, as to the first ground of demurrer. And we have no hesitation in saying, that time has not been made of the essence of this contract by the express stipulation of the parties. The conditions of this bond are not unlike ordinary contracts, except the clause giving the vendor the election to consider the contract at an end, in the event of the non-payment of the money at the time limited. And we conclude, that this provision cannot of itself, be construed as making time material, without some evidence that the vendor elected to so treat it. By this clause, the vendee agreed that the vendor should have the power to declare the contract at an end, upon his failure to pay the money, and the vendor reserved to himself the right to so elect. And, therefore, if he had so elected, and declared the contract forfeited, and returned to the vendee his notes, he might well claim that complainant was not entitled to relief. The bill, however, expressly charges that respondent never has returned, or offered to return, these notes; and that he has never elected to declare the contract forfeited or at an end, and, on demurrer, these averments are, of course, taken as true. In *Benedict v. Lynch*, 1 Johns. Ch. 370, the

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stipulation was, "that if the plaintiff failed in either of his payments, the agreement was to be void," and this stipulation the chancellor upheld, and dismissed the bill. This is the leading case upon the subject of specific performance in this country; and while it certainly has not been followed uniformly by other tribunals, yet, giving to it all the weight due to the eminent jurist who delivered the opinion, we do not think it applicable to this case. In that, the agreement was to be void, if the vendee failed in his payments; and by this language, it is said, the parties expressly made time of the essence of the contract. In this case, however, the contract upon the non-payment of the purchase money was to be at an end, if the vendor so elected. In the one case, as we view it, the contract declared the consequence of non-payment; in the other, the vendor reserved the right to declare the consequences. This he never did; and it would be manifestly inequitable and unjust to permit him to retain the vendee's notes (as he does even yet); never to do anything to notify him that he declared the contract at an end; and yet hold that there was a forfeiture of the contract, because the money was not paid on the day it became due. *Scott v. Fields et al.*, 7 Ohio, 424, was a case similar to the one above cited from 1 John. Ch. In that case, the stipulation was that, if the plaintiff failed to make the payments as specified, he was to forfeit a payment made, and to have the agreement considered null and void. And it was held, that by this stipulation the parties had made time of the essence of the contract; that this had been violated by the complainant, and his bill was, therefore, dismissed. The distinction between this stipulation and the one in the case at bar, is more palpable even than in that of *Benedict v. Lynch*.

The case of *Gilbs v. Champion*, 3 Ohio, 335, was different from the preceding one. There, one-half of the purchase money was to be paid in January, and the other half in the succeeding July. Nothing was paid until the latter day, and then the whole amount due, was tendered. A specific performance was decreed, and a prominent reason assigned for the decision is, that, after the default in not paying the

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first instalment, the vendor held on to the contract, and neither offered to return the notes, nor took any other steps to exonerate the vendee from his liability. In *Rummington v. Kelley and another*, 7 Ohio, 482, however, the vendors, after default, offered to return the notes, and when refused, deposited them in the hands of a third person for the use of the maker. And the vendors, not acquiescing in the delay, but having informed the vendee that they considered the contract at an end, and been active in freeing themselves from liability, it was held that they were discharged. So in the case of *Higby v. Whitaker et al.*, 7 Ohio, 198, it is held, that the law requires some positive act by the party who would rescind, which shall manifest such intention, and put the opposite party on his guard, and it then gives a reasonable time to comply; but it requires eagerness, promptitude, ability, and a disposition to perform, by him who would resist a rescision of his contract. This notice on the part of the vendor to free himself from liability, would, of course, not be necessary in cases where time was either expressly or impliedly of the essence of the contract, or where the vendee had, by his own laches, forfeited all claim to relief.

Neither do we perceive anything in the nature of this property, or otherwise, to justify us in concluding that time was designed to be made of the essence of the contract. Where the land is improved, yielding a yearly rent; where it appears that the property is liable to fluctuation in value, or has actually changed in value; or where the vendee has, by his acquiescence, or otherwise, treated the contract as rescinded; in these and other cases, courts have held, in the absence of express agreement, that time was material, and so designed by the parties. *Brown v. Haines*, 12 Ohio, 1; *Dolarst v. Rothschild*, 1 Sim. & Stu. 590. From the price agreed to be paid in this case, however, we infer that the land was unimproved. There is nothing to show any change in the value of the land; nor that in the period intermediate between the sale and offer to pay, there was any change of circumstances affecting the rights, interests, or obligations of the parties. The complainant's acquiescence

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in the rescision, cannot fairly be inferred, for he comes, as we think, *recenti facto*, before the vendor indicates any intention of declaring the contract at an end, and proposes to pay the money, and also brings his suit. In addition to this, the vendee had contracted to pay the highest rate of interest known to our law; and as compensation, and not forfeiture, is the doctrine of equity, we see nothing, so far, to justify the conclusion, that this contract was forfeited by the non-payment of the money on the day it became due.

We are, then, next to consider, whether the complainant was guilty of such negligence in his offer to pay the purchase money, as to forfeit all right to claim a specific performance. And what we have said as to the other points in the case, is in many respects applicable here. Generally, where no claim of avoidance is in the contract, or where time is not made material by implication, or the avowed object of the parties, specific performance may be granted, as we have seen, on the sound discretion of the chancellor. *Wynn v. Morgan*, 7 Vesey, 202; *Dakin v. Copse*, 2 Russell, 170.

In this case, the bill avers that the vendor was continuously a non-resident of the state at the time the notes became due; and that neither he, nor any person for him, was at the place of payment to demand payment. He at no time notified the vendee that he should insist upon a strict compliance with the contract, nor did he at any time, even so late as April, 1855, when the suit was instituted, return, or offer to return, the complainant's notes, which, for aught appears to the contrary, he still holds, or may have assigned to an innocent holder. Within three months after the last note became due, the complainant, at the place where the notes were to be paid, and to the person who acted as respondent's agent in making the contract, offered to perform the contract on his part, and demanded the deed. This agent's authority had been previously revoked, for what purpose does not appear, nor is it perhaps material. Within six months thereafter, he institutes this suit, and proffers the money by his bill, and avers that he brings it into court.

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For aught that appears, the parties are in the same situation as to this property, that they were on the day of the sale; the vendor has not disposed of it, or in any manner treated the contract as forfeited, nor does it appear that any material injury has resulted to him from the delay; and we think no equitable rule will be violated in requiring him to convey this land, unless the complainant's bill is defective, for the other reasons specified in the demurrer and urged in argument, which we now proceed to consider. Was it necessary that complainant should have tendered to respondent a deed for execution, before bringing this suit? We think not. The English rule, has never been adopted in this state, but on the contrary, has been held not to prevail. *Carson v. Lucore*, 1 G. Greene, 33; *Powers v. Bridges*, 1 Ib. 235.

In the third and last place, we are to consider the objection relating to the tender of the money to complainant. There can be no doubt of the general doctrine, that before a vendee can ask a specific performance of a contract, he must have performed, or offered to perform, whatever the contract has made a condition precedent on his part. Thus, ordinarily, money is to be paid or offered, where such is the contract; and so of anything else devolving upon the party by his agreement. And this is all that is determined by the brief case of *Castleman v. Harris*, 1 Ind. 125, referred to by respondent; but the general doctrine is abundantly sustained by authority, *Washburn v. Dewey*, 17 Vermont, 92; *Greenuf v. Strong*, 1 Bibb, 590; *Bearden v. Wood*, 1 A. K. Marshall, 450; *Colson v. Thompson*, 2 Wheat. 336; Story's Eq. Jur. § 771.

But even this general rule, will be found not to be of universal application. One exception is, where the vendor has put it out of his power to comply, or rendered it unnecessary, by refusing to convey; another, where the terms of the agreement are incapable of being strictly complied with; another, where the parties have subsequently to the agreement, expressly, or impliedly, waived the precedent performance. Other courts, again, have gone so far as to hold, that an offer to perform at the time of suit brought, and the

bringing the money into court, ready for the vendor, will be sufficient, subject the question of costs. And we are by no means prepared to say, that we should refuse relief, merely upon the ground that a previous tender was not proved, if the complainant brought his money into court, subject to the respondent's control, giving to the vendor compensation for any costs incurred or injury sustained, and which costs or injury, it should appear, might have been avoided by the tender or offer to perform. It is not necessary, however, to place the decision of this case upon this latter ground. The bill alleges that the notes were to be paid at McGregor's office; that respondent was a non-resident of the state, and had revoked the power of the agent to receive the money. He applied within a reasonable time after the maturity of the notes, at the proper place, to pay them, and demanded the deed. No person was there to receive the one, or execute the other. He was not bound to follow the vendor to his residence in New York, to make a tender. It was so far unreasonable, if not impracticable, to exact this, that equity and good conscience will not require it. Where the holder of an instrument is absent from the state when it becomes due, the maker may tender payment at the last residence or place of business of the payee before the instrument became due, and if there be no person authorized to receive the same, the maker may deposit the money with the clerk of the district court of the proper county, and the maker shall be liable for no interest from that time. Code § 958. Now, while this provision does not, in terms, apply where the payee has never had a residence in the state after the note was given, yet by a fair and equitable analogy, it might be well implied. In this case, the maker avers that he brings the money into court, and there is, therefore, a virtual deposit with the clerk, subject to the control of the payee. But without the aid of the statute, we do not think that the maker was bound to follow the payee, in order to proffer to him, in person, a performance of the contract; and that therefore, without reference to his offer to pay at the office of the agent, he is excused for not

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making the tender. That offer is only material as showing a disposition to fulfill his contract, and that he did not design to abandon it. We would not encourage a disregard of the binding obligation of contracts, nor sanction the idea that parties may at their own pleasure, at any time, offer to perform them. By their agreements as to time, as in all other things, they should be bound, and it is no part of our duty to make a contract for them. But where time is not made of the essence of the contract, either expressly or by fair implication; where the vendor holds the notes given for the purchase money, and gives no notice, actual or constructive, of his intention to treat the contract as abandoned; where there is no change in the circumstances of the parties, or ought to indicate that any damages have resulted to the vendor from the delay, and the vendee, within a reasonable time, manifests a disposition to pay his money, and perform his contract, and follows it up by bringing his suit; we can find no case that would deny him relief, and we are unwilling to be the first to establish the precedent.

Decree affirmed.

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Courts of equity will decree parties to perform that, which, in legal contemplation, they are able to perform, and not that which, it is manifest, they have no legal power to carry out; and if the decree is to be void and imperfect, and cannot be performed, a specific performance ought not to be decreed.

Where it has become impossible for a party to perform his part of the contract, a court of equity will not decree such performance, but will either leave the party to his legal remedy, or retain the bill, for the purpose of awarding compensation to the injured party.

Where in a suit in equity to enforce the specific performance of a contract to convey real estate, the answer of the respondent alleged, and the evidence proved, that the vendor, before the commencement of the suit, had conveyed the land to other persons, who were not made parties, or charged with notice, the bill was dismissed.

Appeal from the Polk District Court.

ON the 7th of April, 1849, the respondent made his title bond, by which, in consideration of two hundred dollars to him paid, he bound himself to convey to one Bostick certain town lots in Fort Des Moines, so soon as he obtained a title for the same from the commissioners of Polk county. This bond was transferred by Bostick to Almond, and from Almond to the complainant—the last transfer being made August 17th, 1854. In December, 1854, this suit was commenced against Buzick, to enforce a specific performance of the contract. Among other things, Buzick sets up in his answer, that he had before the commencement of this suit, tendered to complainant the amount due on the bond, which he refused to receive, and that he had also previous to that time, conveyed said lots to G. & P. M. Scott; and at the time of the commencement of this suit, he had no title therein. The replication denies the conveyance to Scott, and admits the tender of four hundred dollars. The cause was heard on the bill, answer, replication, exhibits and proof of a warranty deed from respondent to Scotts, for these lots, dated September 25, 1854, and recorded June 23, 1855; and upon this proof, the equities were found in favor of complainant, and decree accordingly.

J. E. Jewett, for the appellant.

W. Penn. Clarke, for the appellee.

WRIGHT, C. J.—But one question is presented for our determination. It appears that respondent, before the commencement of this suit, parted with all his interest in these lots, by his deed to the Scotts. They are not made parties to the bill; neither is there an averment or proof, that they had notice of the outstanding bond at the time of their purchase. Their rights, then, cannot be affected by these proceedings. If complainant obtains a decree against re-

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spondent, requiring him to convey, it is evident he must obtain a deed, that conveys no title, for respondent has no title to transfer. Under such circumstances, will this court decree a conveyance, and if so, upon what principle?

At common law, where a contract to sell or transfer any specific thing, is unperformed by the obligor, no redress can be had, except in damages. And thus, at law, the party is left to his election, to either pay the damages or perform his contract. Courts of equity, however, regarding such a course as inadequate for the purposes of justice, interpose, and require in proper cases, a specific performance of the contract, not treating it as a mere personal contract or covenant. But the exercise of this power, carries with it necessarily the power to enforce the decree when made. Courts of equity will decree parties to perform that, which in legal contemplation, they are able to perform, and not that which, it is manifest, they have no legal power to carry out. If the decree is to be void and imperfect, and cannot be performed, then a specific performance ought not to be decreed. *Tobey v. County of Bristol*, 3 Story, 800. So, where it has become impossible for a party to perform his part of the contract, a court of equity will not decree such performance, but will either leave the party to his legal remedy, or retain the bill, for the purpose of awarding compensation to the injured party. Story's Eq. Juris. § 714. And the learned author here refers to the very case before us, where the performance has become impossible, on account of a subsequent sale of the subject matter of the contract, without notice, as one of the instances in which a decree will not be made for its specific execution. And that this is the equitable rule, we think is well settled, both upon principle and authority. In *Kempshall v. Stone*, 5 Johns. Ch. 194, a decree for the specific performance of an agreement, was refused, upon the ground that the vendor had, after the time of performance had elapsed, and before the filing of the vendee's bill, sold and conveyed the land to a third person for a valuable consideration, without notice of such prior agreement. See also *Hatch v. Coff*, 4 Ib. 559; *Waters v. Travis*, 9 Johns.

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450. And indeed, we understand, that it is as essential that a contract shall be capable of being performed, before it will be so decreed, as that it shall be certain and fair in all its parts, or founded on any adequate consideration. Story's Eq. Juris. § 751. If the subsequent purchaser has notice of the contract, then he stands upon the same equity as his vendor; he may be decreed to convey in the same manner, and he is, in fact, but the trustee of the first vendee. But is the complainant remediless? We answer, by no means. With a bill properly framed, with proper parties, he may be able to show that the subsequent vendees purchased with notice, or that he is entitled to compensation, or damages against respondent, by reason of his failure to convey the premises. Under this bill, however, he can claim neither a decree against such subsequent vendees, nor compensation. But as it is at least probable, that he has sustained an injury which should be remedied, his bill will be dismissed, without prejudice. Decree reversed, with leave to complainant to proceed *de novo*.

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In re-establishing a lost survey, course and distance must yield to fixed monuments.

All ascertained surrounding monuments must be allowed their due weight in determining the locality of the unascertained, under the system by which the survey was originally made.

Where on a line of the *same* survey between remote corners, the whole length of which line is found to be variant from the length called for, in re-establishing lost intermediate monuments, as marking sub-divisional tracts, we are not permitted to *presume* that the variance arose from the defective survey of any *part*, but must conclude, in the absence of circumstances showing the contrary, that it arose from the imperfect measurement of the *whole* line, and distribute such variance between the several sub-divisions of such line, in proportion to their respective lengths.

Unknown corners must be found by the corroborative testimony of *all* known corners, with as little departure as may be from the system adopted on the original survey, without giving preponderance to the testimony of any one monument above another.

Appeal from the Dubuque District Court.

THIS action was commenced by Moreland against Page, on the 8th day of April, 1854. The petition alleges that the plaintiff is the owner of the east half of the south-west quarter, and the west half of the south-east quarter of section four, in township ninety, north of range three west, and of right entitled to the possession of the same; that the northern boundary of said lands, is a line surveyed by Joel Bailey, as per diagram marked "B," that the defendant, Page, is in possession of so much of said lands as lie between lines marked "A. B.," and "C. D.," as shown by said diagram; and that the defendant claims to be the owner of the land so by him possessed, and claims that the said line marked "C. D.," on said diagram "B.," is the proper line between plaintiff and defendant. The answer of the defendant denies that the line claimed by the plaintiff is the true boundary, and insists, that the line marked "C. D.," on said diagram "B.," is the true line of boundary. The District Court found in favor of the plaintiff, and rendered judgment accordingly, from which the defendant appeals, and assigns the rendition of the same for error. The facts of the case, are fully stated in the opinion of the court.

H. A. Wiltse and Clark & Bissell, for the appellant.

Both parties claim under patents from the United States, both have introduced their patents as evidence of the lands owned by them, respectively, and the rights of the parties are to be determined by the description contained in the patents. 3 Pet. 96.

The patent description is a certain subdivision, containing a given number of acres, "according to the official plat of the survey of the land returned to the general land office by the surveyor general." The plat thus incorporated by the patent, is made from the field books of the deputy surveyors (see 2d sec. of act of 18th May, 1796), and is the official record and best evidence of the survey, and is that description by which plaintiff holds. 3 Pet. 96; 17 Mass. 207.

$$\mathbb{B}$$
[illegible]

[illegible]

NOTE: The dotted line A.B. is the "Joel Bailey" line claimed in petition. The distances in dotted sweep are the "Joel Bailey" measurements.

Plaintiff seeks to impeach this record, by denying that a survey was actually made, but his patent closes his mouth. See act of 11th of February, A.D. 1805; Land Laws, part 1st, p. 119. Is it competent for a state court to impeach a United States record, thus sanctioned? Admit that the record can be impeached, and that the survey is shown never to have been made in fact, and it follows incontrovertibly, that the president had no authority of law to sell this land, and the words of grant in plaintiff's patent, become inoperative, because combining no description, and the grant is therefore void; plaintiff has no title in an action, where, if he recovers, it must be upon the strength of his own title. 5th section of act of 18th May, 1785, Land Laws, part 1st, p. 32; 9th Watts, 117.

But in the view of the defendant, the record of the United States surveys, when incorporated into the patent, lose the exclusive character of, and cease to be, for the purposes of that patent, a record or a survey. It becomes simply a description of land sold, and as between grantor and grantee, or as between any claiming under them, subserves no other purpose. The patent in the present case describes the land conveyed, in three ways, by marked lines, by monuments at the corners, and by courses and distances. It is admitted, that neither the marked lines nor the monuments, are to be found; we are, therefore, compelled to fall back upon the courses and distances, as the best and only evidence of the boundaries of the land sold. 3 Pet. 96; 4 Wheat. 444.

This is equally true, if the lines and monuments described in the patent, were in fact never actually made upon the ground. 1 U. S. Dig. 475, or 2 Dana, 2; 4 U. S. Dig. 352, § 131, or 9 Dana, 338.

At most, the absence of marked lines and monuments, can only show that part of the patent description is false; but if that part which is true constitutes a valid description, by which the land can be identified, the addition of other circumstances which are false, will not frustrate the deed. 7 Johnson, 217; 4 Mass. 205; Comyn's Dig. Fait (E. 4), 288.

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But the plaintiff offers in evidence the instructions of the surveyor-general, governing the deputies of that day in making their original surveys, and proposes to ascertain his land, by surveying, in accordance with those instructions, as in an original survey. We submit this is not evidence as to any matter legitimately before the court. Plaintiff does not hold under the instructions of the surveyor-general, but under a patent from the United States, and the only subject of inquiry legitimately before the court, is to ascertain, not such lines as accord with the instructions of the surveyor-general, but such lines as coincide with the boundaries described in his deed. Plaintiff does not pretend that such line as he proposes to run out, would coincide with the boundaries described in his patent; he does not design, it is not his object, to run such line; he seeks to establish such lines as agree with the instructions referred to; such lines it may be, as the original surveyor *ought* to have at first established, but such as are perfectly independent of, and have no reference to, the description in his patent. Possibly showing where a line *ought* to have been placed, is, under some circumstances, competent evidence to show where it actually *was* placed; but as in the present case, plaintiff denies that such lines *were* ever run, he cannot intend to offer this evidence to show *where* they were run. These instructions are not referred to in the patent; they establish the boundaries by a method independent of, and not contemplated by the patent; they are, the refore, not competent to vary or affect rights under it, and can have nothing to do with, and no place in, this case.

In seeking to fix upon the ground, the boundaries described in the patent, we meet with the following facts: The corners of sections in the north town line, are ascertained and identified.

The monuments identifying the corners on the east and west line, dividing the two northern tiers of sections, except the corners in the range line, and the corner of sections 5, 6, 7, and 8, are missing.

The monument identifying the corners on the north and

south lines, between the corner of sections 9, 10, 15, and 16, the quarter section corner of 8 and 9, and the north town line, are missing. Also, all evidences of any marking of the lines described, is wanting. The calls of the patent for marked lines and monuments, being unanswered, the courses and distances of the patent are the only means at command, by which to identify the land conveyed. How shall these lines and courses be established, or re-established, so that the courses and distances of the patent shall be followed ?

The line in dispute, is simply that dividing the north half from the south half of section four, yet as in the patent it appears, not as an independent line, but as one connected with and bearing certain specified relations to other lines, it is manifest that, in now fixing the locality of the line, the same connections and relations should be carefully preserved. This line must, therefore, be established with reference to the whole of the other adjacent unidentified lines and corners, because it is a part of a survey, which in connection with the other lines in the township, constitutes a whole.

The subdivision of a township into sections, is a series of meridian lines one mile apart, with east and west lines at the same distance, crossing them at right angles. See 4th paragraph of the ordinance of 20th May, 1785, Land Laws, pt. 1, 11; act of 18th May, 1796, § 2, Land Laws, pt. 1, 50; act of 11th Feb., 1805, § 1, Land Laws, pt. 1, 119. The map of this township so represents the original survey in this case. Consequently, there is ever an existing monument at both ends of any line or boundary upon which monuments are lost. In a straight line between these existing monuments, missing ones are to be established.

Applying this rule to the case before the court, we necessarily run the very straight line represented by the map incorporated into the patents of the parties, between the existing corner in the east boundary, and the recognized corner to sections 5, 6, 7, and 8. Then commencing at the corner sections 9, 10, 15, and 16, we run to a point in the north boundary of the township, seven links west of the corner to sections 33 and 34, establishing the corner to sections 3,

4, 9, and 10, at the intersections of these right lines. Then beginning at the quarter section corner between sections 8 and 9, run a line that will intersect the north boundary of the township, at a point sixteen links west of the corner to sections 32 and 33, establishing the corner to sections 4, 5, 8 and 9 at the intersection of the lines, in manner aforesaid. Then the distance between these ten sections corners, thus established, and the north boundary, being known, the quarter section corners on the east and west sides of section 4, are to be established at those points respectively, which will give to that part of the lines lying both north and south of these corners, the same relative proportion of length as is given to them by the official map.

The lines thus established, not only conform precisely to those represented upon the official map, but precisely answer the rule of law prescribed by second section of the act of Congress of 11th of February, 1805, "by running straight lines from the established corners to the opposite corresponding corners." It coincides with the system, and preserves the harmony of the surveys.

On the other hand, the mode insisted upon by the plaintiff, has no sanction in the patent under which he holds, is at war with the soundest principles of law, and in direct contravention with the letter and spirit of the act of 11th of February, 1805; it violates the vested rights of the defendant, subverts a simple and beautiful system, and introduces in its place, the veriest uncertainty and confusion.

Smith, McKinlay & Poor, and T. Davis, for the appellee.

This is an action at law, and as the court has appellate jurisdiction in chancery cases *only*, of course, no errors on questions of fact will be examined. We will assume the fact, which the evidence tends strongly to prove, that there never was a survey made of those parts of the township where no corners can be found; that, to use the words of the department at Washington, the survey was "imaginary and fraudulent;" and that the finding of the issue for the plaintiff, settles this question of fact conclusively. The

court had a right to order a survey. Code, §§ 2021 and 2022. As the original survey was only done in part, the balance being "imaginary and fraudulent," the court ordered the survey to be on the same plan that it should have been; to commence where the government surveyor left off, and carry out the original plan, according to the acts of Congress, throwing the fractions on the north and west. There is no dispute, but that that system will produce the line we contend for. The issue of fact on that point, is conclusive. The only question is, whether this was the legal mode, remembering that this land was never surveyed by the government. This, then, is an original survey. The court now orders that to be done now, in the same manner, that it should have been done in the first place. The act of Congress of May 10th, 1800 (Public Land Laws, 71, § 3), provides: "And in all cases, where the exterior lines of the townships, thus to be subdivided into sections or half sections, shall exceed, or shall not extend, six miles, the excess or deficiency shall be specially noted, and added to, or deducted from, the western or northern ranges of sections or half sections, in such township, according as the error may be in running the lines from east to west, or from south to north." See, also, a copy of the instructions of the surveyor-general, filed as part of the record in this case. The work must be commenced at the first known corner south, and run north; and in the words of the above act, the subdivisions which are not fractional, must have their "complete legal quantity." It is the fractions that must stand the deficiency. These acts of Congress were, as they purport, made to provide for the *disposition* and sale of the public lands. When these lands are once sold, and the purchaser gets a patent for a "complete legal quantity," called a quarter section, the United States and its officers, have no right to order another survey, on a new principle, that will take away part of that "complete quantity," which the act of Congress and the patent insures him. The surveyor-general and the general land officer, have neither the power to *adjudicate* on the equities; nor to repeal the act of Congress;

nor to curtail the "complete quantity;" nor disturb vested rights.

ISELL, J.—This was an action of right brought to settle the north boundary line of the east half of the south-west, and west half of the south-east quarters of section four, township ninety, north of range three, west of the fifth P.M. situate in Delaware county. Defendant is the adjoining owner on the north. A strip of land about three chains in width, claimed by both parties, constitutes the subject of the controversy. The dispute grows out of the fact of the original survey of a large part of the northern two ranges of sections in this township, having been either defectively or fraudulently made. This survey was made in 1837, and in 1849, complaints having reached the commissioner of the general land office, that the marks and monuments called for in the original field notes of the survey of the north part of this township, had not been found, and probably had never been made, and that the distances from the corners which existed to the north boundary, were not as great as represented in the plat and field notes of the original survey, said commissioner caused an accurate examination of the whole township, to be made by an experienced surveyor. This examination discovered that many of the sub-divisional corners could not be found, and that they had probably never been established, as the quantity of land in the north two ranges of sections, was less than represented by the original notes, and the topography, in some instances, was at variance with the calls; as, for example, corners which were represented, as in timber, were where there had never been any timber. By this examination, all the section corners on the lines bounding the north two ranges of sections, and that at the north-east of section seven, were found. Also, all the quarter section corners on the west lines of the following sections, viz.: 6, 7, 8, and 9, and that on the south line of section 11. No other monuments or subdivisional marks were found, and those situate on the south line of these two ranges were not accurate, as called for in the field notes of the original survey. The sev-

eral ascertained and unascertained corners will be readily understood from the attached plat.

In April, 1852, said commissioner, having become satisfied from the examination, that the survey had been defectively made, though after the purchase by the parties to this suit, and after the sale of most of the land in this township by the United States, caused a re-survey of the whole township, under the instructions of the surveyor-general of Wisconsin and Iowa, by Edward James, jr., deputy, who had been detailed for that purpose.

These instructions bear date April 12, 1852, and so far as material are as follows: "Commencing in the manner prescribed in the accompanying instructions" (which instructions were the general printed instructions of the surveyor-general of Wisconsin and Iowa, to his deputies in making government surveys of the public land, and the same under which the survey had been originally made), "you will proceed to retrace the lines of the existing survey from corner to corner, and wherever the same are found, and can be fully identified, as those established by the original surveyor, you are to affix thereto your own official marks of recognition, and from said corners you will run, mark, and re-establish the lines and corners for the residue of the township."

"In surveying between recognized corners at remote distances apart, you are to random from corner to corner, and correct back, distributing the excess or deficiency, as the case may be, equally, so that each section may receive its due proportion of either."

The line between plaintiff and defendant, as ascertained by this mode of survey, falls south of that claimed by plaintiff, about two and one-half chains. It will be observed by a careful examination of the description of the found corners, as hereinbefore given, that the *quarter* section corner on the west line of section nine, and the section corner at the southeast of said section, are corners found and identified on the examination, and the same were recognized on the re-survey. The decision of the court below, was, in substance, that the dividing line between the parties should be fixed and estab-

lished, by measuring north from these two ascertained corners, lines parallel with the east line of the township, from the first described corner eighty, and the last one hundred and twenty chains, and that a right line between the points attained by such measurement, constituted the true line between the parties. This mode of survey, finds the line claimed by plaintiff and appellee in this suit.

It is claimed by defendant, that the true mode of ascertaining the line in dispute, is by running right lines from the starting points assumed by the court below, to the found corners at the north-west and north-east corners of section four, and also a right line from the found corner at the north-east corner of section seven to that of the north-east corner of section twelve; that the points of intersection of these lines, will establish the true corners of sections 4, 5, 8, and 9, and also, sections 3, 4, 9, and 10; that having thus ascertained the *section* corners, the *quarter* section corners on the east and west sides of section four, should be placed at those points respectively, which will give to the parts of the lines lying both north and south of these quarter section corners, the same proportion of length which was given to them by the original survey as returned; and that a line drawn between these quarter section corners, thus established, constitutes the true line in dispute. By this mode, a line is found something near a chain south of the one as established by the re-survey.

Both parties have introduced their patents in evidence, and both have relation to the original survey. Neither party claims any advantage, on account of priority of purchase. The title of neither to the land on his side of the *true* line, is disputed. The sole question then is, what is the true line between the parties? Did the court below determine the true line? We think not. Here is a large body of land, comprising nearly two ranges of sections, on the north part of the township, on which no subdivisional monuments can be found. Of this body of land in *gross*, there is less in quantity than is called for in the original survey. Yet we are, as between the parties here, to regard it

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as a lost survey, and not as never having been made. It must be restored. But upon what principle the court should determine, that the plaintiff was entitled to carve out of this body of land, made up of numerous subdivisinal tracts, the full quantity which his patent called for by actual measurement, and leave others, who had purchased other subdivisinal tracts of the same body, under the same conditions with himself, a deficiency, we are at a loss to determine. Had this body of land, on which there are no monuments found, exceeded, instead of falling short of, full measurement according to the original survey, the purchasers of the specific tracts included in this body, would have been sharers of the excess in due proportion, and the plaintiff, with others, to his proportion. On the other hand, he should share the deficiency. But it is said, that fractions in subdividing townships, all fall on the north and west sides of the townships. That is true in making an entirely new survey; but this survey is not an original one; it does exist, at least on paper. The purchases have all been made in relation to it. The purchaser of a fractional forty acre tract, located on the north or west side of the township, to the extent of the quantity designated in that fraction on the plat, and by the field notes of the original survey, purchased as *definite and determined a quantity* of land, having *as fixed and determined relations to the whole tract*, the survey of which is now lost, as did any one who purchased those several tracts not designated as fractional. The person who might purchase a tract on the north side of the township, designated on the official plot of the original survey as containing thirty-nine acres, had *as perfect a vested right* to receive thirty-nine full acres, as he who purchased a quarter section in any other part of this body, had to the hundred and sixty acres called for by his patent. If this is true, it follows that the line established by the court below, is not the true line; for it gives full measure from south to north to the plaintiff, while, by so doing, it leaves to the defendant less length of line from south to north, by two and one-half chains, than he would have had, after sharing his proportion of the general defi-

ciency. Neither do we think the line contended for by the defendant, the true line. The fallacy involved in the reasoning by which it is sought to be supported, we think, consists in this: *First*, it assumes that this survey was *theoretically* correct. *Secondly*, that certain *individual* monuments are absolutely correct and unimpeachable, namely, those at the north-east and the north-west of section four; that at the south-east of section nine; the quarter corner on the west line of section nine; that at the north-east of section seven; and that at the north-east of section twelve; while it leaves out of sight other monuments having an influence upon the conclusion to be arrived at, which are equally correct and unimpeachable. And, in addition to this, it ignores the practical mode of making these surveys by the government. It is true that defendant claims, that the general printed instructions under which the township was originally surveyed, are not to be considered; because, he says, his purchase is in relation to the plat and field notes, and not the instructions under which the survey was made. We cannot entertain this view; for in the first place, it is equally true of the purchase of any other subdivision within this area, the subdividing monuments of which are not found; and secondly, the provisions of the law regulating the manner the public lands shall be surveyed, showing the relations which one tract shall bear to another, and how the several tracts shall be designated, as that it shall be laid off into townships by certain lines, subdivided into sections, those sections into quarter sections by a uniform mode, those townships and sections numbered in a particular manner, &c., with *the general instructions from the proper department, pointing out the practical manner in which these townships and their subdivisions shall be surveyed*; the field notes and plats officially made, certified and deposited in the proper repository; all necessarily enter into the consideration, in attempting to restore a lost survey made under them. They together, to speak figuratively, constitute the domesday book of our western states. The dominion of every landholder has relation to them, and without here deciding that this court

will take judicial notice of these general instructions, for it is unnecessary, they having been introduced in evidence, yet we have no hesitation in saying, that they are proper here to be considered. We say, then, that the defendant in his reasoning, leaves out of sight monuments that have an influence in the conclusion to be arrived at.

Without citing these general instructions at length, we think this will readily be appreciable, when we take into consideration the fact, that the interior section lines, east and west, through the township, are not right lines drawn across the whole township, but any given one of these lines, is made up of a series of closing section lines, each to some extent independent of the others. These several section lines may, by a remote possibility, constitute a right line across the township. If practical surveying could be made as perfect as theoretical, they might form a straight line, but the difference between theory and practice is such, that the fact is, they seldom if ever do; while, on the contrary, each line across the township, from east to west, dividing sections, generally has as many distinct courses as there are sections lying on either side of it. Yet, nevertheless, on the principle of subdividing townships adopted by the government, any one of these lines east and west through the township, so made up, whether straight or crooked, constitutes, in *effect*, the *base* line for the survey of all the land lying north of it in the same township; or, to speak more accurately, each separate south section line, is in fact, the base line for the survey of the section lying north of it. Now, the line on the south side of these two tier of sections is found. Its section corners are all marked. It is not, in *fact*, a straight line, but that part of it which bounds any one of these sections, on the south, is, in fact, the base line for the survey of the land lying north of it, and must necessarily influence the survey of all the land lying north of it to the township line. But the line from the north-east corner of section seven to that of section twelve, the intersections of which defendant claims, marks the true southern corners of section four, is a straight line. While that on the south boundary of the sections

which this straight line marks on the north, is not straight, yet the south line is the base from which the other, if ever made, must have been made. The one maintains uniformly the same course for five miles, while the other, which should be the base, and this a parallel, so far as practice may coincide with theory, does not maintain the same course through any two consecutive miles. The monuments all along this line, and all the other monuments all around this body of land, the subdivisional monuments of which are not found, are as absolute, unimpeachable verities, as the two adopted by the court below, or the *six* claimed by the defendant. The several tracts of land on the plat, in relation to which the several purchases were made, are each as fixed, and have each as determined relations to each other, and to each of these monuments, as they do to any one of those claimed by defendant. The unknown corners must be found by the corroborative testimony of *all*, with as little departure as may be, from the system adopted on the original survey, without giving any preponderance to the testimony of any one monument above another. In doing this, courses and distances, which are the elements of superficial *measure*, must yield to the facts, namely, the established monuments. In other words, to use a homely adage, the several garments must be cut according to the cloth.

We do, therefore, adopt the mode of survey in restoring these corners, laid down by the surveyor-general of Wisconsin and Iowa, in his instructions of April 12th, 1852, to Edwin James, Jr., under whom the resurvey was made, which instructions have been herein recited. We do not, however, adopt this mode of survey, on account of any authority which any of the departments of the general government has to interpose after the sale of these lands by it, to settle the boundaries between the parties; but for the sole reason, that we deem the principles contained in the instructions, the true principles recognized by the law in like cases. We have carefully examined the authorities cited by counsel, and are satisfied that they contain nothing that conflicts with the principles in these instructions. We understand

these principles to be, first, the familiar, though cardinal one, that course and distance must yield to fixed monuments. This principle is no more familiar in law, than in practical surveying. The surveyor employed to subdivide a township, commences to practice upon it the second line he runs, and continues to do so every second or closing section line through the whole township. To illustrate: he commences one mile west of the south-east corner of the township, having adjusted his compass to correspond with the last line; he runs north a mile and east a mile, but he fails, unless by a very rare occurrence, of exactly striking the mound established one mile north of the south-east corner of the township, but he only makes the line accommodate itself to this monument in length and bearing, and continues to do so at the closing of each section throughout the township.

The second principle, we understand to be, that all ascertained surrounding monuments shall have their due weight, in determining the locality of the unascertained, under the system by which the survey was originally made. Thirdly, that where on a line of the *same* survey, between remote corners, the whole length of which line is found to be variant from the length called for, in re-establishing lost intermediate monuments, as marking subdivisioal tracts, we are not permitted to *presume* merely, that a variance arose from the defective survey of any *part*; but we must conclude, in the absence of circumstances showing the contrary, that it arose from the imperfect measurement of the *whole* line, and distribute such variance between the several subdivisions of such line, in proportion to their respective lengths.

It has been urged by plaintiff, that this is not a *lost survey*, but that a survey has never been made. To adopt this view, would be to defeat his entire title. His patent has relation to a survey which, if it never existed, leaves him without description in his grant. We cannot conclude that there never has been a survey, though it should have been merely imaginary, so far as the interior lines of these two ranges of sections are concerned. For, although imaginary, it has been platted and numbered, and incorporated into the sev

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eral grants. The purchasers of all the subdivisions numbered on that plat, have purchased with relation, not only to the monuments, but to the township, range, sections and subdivisions of sections, *as shown by the plat*. And now, as between these purchasers, it would be an enormity to entirely disregard it.

The judgment of the District Court is reversed, and the District Court is directed to proceed to enter judgment in accordance with this opinion.

WILLIAMS & CUNNINGHAM v. HOUSEL, Garnishee.

Where a garnishee answered as follows: "At the time of the service of the garnishee notice in this action, I had under my control property of the defendants to the amount of probably \$2,000—it may have been more or less. This property had been previously attached at the suit of Lawrence, Stewart & Co., against Robbins & Co., and released by a bond on which I was surety. To secure me against my liability on said bond, Robbins & Co. executed to me a chattel mortgage on said property, with power at any time to take said property into my possession. Previous to my being garnished in this suit, I had taken possession of the said property, and was selling the same under a subsequent agreement between said Robbins & Co. and myself. Since the time of my garnishment in this action, the said property was attached by Harvey Leonard, sheriff of Scott county, and taken from my possession. The above-mentioned suit of Lawrence, Stewart & Co., against Robbins & Co., in which said property was attached, was brought for about \$1,000 and costs;" and judgment was rendered against said garnishee on said answer, for the amount of the plaintiff's claim against the original defendants; *Held*, That the District Court erred in charging the garnishee on his answer, at this stage of the proceeding.

The garnishee's liability is to be measured by his responsibility and relation to the defendant in the original suit, and he is to be charged only in consistency with, and subject to, his contract with such defendant.

If a garnishee is chargeable at all, and has sufficient means in his hands, it is not error to render judgment against him for the costs of the original suit, in which he is garnished.

Garnishees are presumed to be innocent persons, and indifferent between the parties; and it is for the plaintiff to *show* the garnishee's liability, either from his answer, or by forming an issue on the answer, and showing it by other proof.

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Appeal from the Scott District Court.

WILLIAMS & CUNNINGHAM sued Robbins & Co. for a debt of about \$284, and garnished P. M. Housel, the appellant.

The whole question arises on a brief answer of the garnishee, which is as follows: "At the time of the service of the garnishee notice in this action, I had under my control property of the defendants, to the amount of probably \$2,000; it may have been more or less. This property had been previously attached at the suit of Lawrence, Stewart & Co., against Robbins & Co., and released by a bond on which I was surety. To secure me against my liability on said bond, Robbins & Co. executed to me a chattel mortgage on said property, with power at any time to take said property into my possession. Previous to my being garnished in this suit, I had taken possession of the said property, and was selling the same under a subsequent agreement between said Robbins & Co. and myself. Since the time of my garnishment, in this action, the said property was attached by Harvey Leonard, sheriff of Scott county, and taken from my possession. The above-mentioned suit of Lawrence, Stewart & Co., against Robbins & Co., in which said property was attached, was brought for about one thousand dollars and costs."

The third suit under the attachment, in which the property was taken from the possession of Housel, appears, from the argument, to have been in the name of *Brown, Frederick & Kimball v. Robbins & Co.* Judgment was rendered against the garnishee upon his answer, from which he appeals.

Cook & Dillon, for the appellant.

Davison & True, for the appellees.

WOODWARD, J.—In our opinion, the District Court erred in charging the garnishee in this stage of the proceedings.

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The plaintiff assumes a principle which cannot be assented to at once: that is, that the garnishee is *presumed*, in the process of garnishment, to be indebted, or to hold property. This is no more presumed of him, than of a defendant. A judgment is rendered on default, not on such a presumption, but because a default is an admission. In this proceeding, the plaintiff is to *show* the garnishee's liability; and this is done, either by his answer, or, under our statute, by forming an issue on the answer, and showing it by other proof. But there is a state of circumstances, in which the presumption may be against him. If there be a material matter which he is bound to know, to ascertain, and to state, and he leaves it doubtful, or unexplained, the presumption is against him. But this applies only to a fact which he can know definitely, and is bound to know, and which relates directly to his liability. But this rule does not apply to the leading fact in this case. The plaintiff urges that Housel, the garnishee, has shown, in his answer, that he holds property to the amount of five hundred dollars, more than he is liable for. The facts on this point are thus: Housel answers that the plaintiff's suit was brought for about one thousand dollars and costs. He may be bound by the statement of one thousand dollars; but the costs were a matter which he was not bound to know. Again, he is not to be bound by his *estimate* of the property; for, first, the sheriff's attachment is a more certain guide, being made under oath by an officer, and under some kind of an appraisement, as is to be presumed; and, second (which is the principal consideration), his liability depends, not upon his estimate of the property, but upon the *result*, as to whether it discharges the plaintiff's claim, and then leaves a surplus. He has a right to require that this should be ascertained with certainty, before he is charged, and that it should not rest upon his conjecture or estimate, and this he cannot know, for it depends upon a *sale* of the goods. The subsequent arrangement, that he should proceed to make sale of the goods, is not to be construed as a new and independent contract, but as under the mortgage, he

holding the proceeds subject to the attachment previously made.

But again, the usual condition of a delivery bond (which we assume this to be), is, that the property shall be forthcoming, or the value of it paid. Then Housel, having possession of the property, would have a right to deliver it to the sheriff when he should come with an execution. Supposing he should do this, what then becomes of the garnishment? And if the bond were to pay the judgment absolutely, he could not be charged, at least, until the certainty and extent of his liability was ascertained. It is to be remembered, that the garnishee's liability is to be measured by his responsibility and relation to the defendant; that his rights are to be regarded; and that he is to be charged only in consistency with, and subject to, his contract with the defendant. It would have been competent for the court, we suppose, to continue this part of the case on application from either side, until further proceedings in the prior attachment, disclosed whether anything remained in the hands of the garnishee, and to permit or require a further answer, showing the result. The foregoing views are sustained, we think, by the books and authorities, which may be referred to without enlarging. See Drake on Attachment, and authorities, chapters 22, 24, 25, and §§ 675, 676, chapter 35, and the cases cited by plaintiff's counsel, mean nothing different. See *Bebb v. Preston*, 1 Iowa, 460.

It is further objected, that the court erred in rendering judgment for costs against the garnishee. We understand this judgment to refer to the costs in the suit of the plaintiff's against Robbins & Co. If this is so, the court did not err, in case he was chargeable at all, and had sufficient in his hands to cover the costs.

A further objection is, that the court erred in rendering judgment finally against the garnishee, before Robbins & Co. were brought into court. The judgment against Housel, states that a judgment had been rendered against Robbins & Co., and we will presume this to be regular.

We do not see our way clear to decide more than that the

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garnishee is not chargeable in the present state of the case. Therefore, the judgment of the District Court herein is reversed, and the cause remanded.

THE STATE OF IOWA v. BUTTERWORTH.

Where an action of trespass was brought in the name of "The State of Iowa, who sues for the use and benefit of the Des Moines navigation and railroad company," and the petition alleged that the trespass was committed on certain lands "belonging to, and being the property in fee simple of, the said state of Iowa;" and where the petition was demurred to, on the ground that it appeared from the petition, that the plaintiff had no interest in the subject matter of the suit, and that the real party in interest should sue for a trespass, and not another for his use, which demurrer was overruled; *Held*, That the words "for the use and benefit of the Des Moines navigation and railroad company," were mere surplusage, and that the demurrer was properly overruled.

Section 1676 of the Code, which provides that civil actions must be prosecuted in the names of the real party in interest, has reference, at least in part, to sections 949 and 952, which make claims assignable by writing, which before were not, so as to enable the assignee to sue in his own name.

Is a claim for a tort, assignable, *quere?*

Appeal from the Webster District Court.

THIS is an action for trespass, brought in the name of "The State of Iowa, who sues for the use and benefit of the Des Moines navigation and railroad company," for trespass on certain lands "belonging to, and being the property in fee simple, of the said State of Iowa." The defendant demurred to the petition, for the following reasons:

1. It appears by said petition, that the plaintiff has no interest in the subject matter of the suit.
2. The real party in interest should sue for a trespass, and not another, for his use.
3. The state of Iowa cannot sue for a trespass, for the use or benefit of any person or company.

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The demurrer was overruled. The defendant appeals, and assigns the overruling of the demurrer for error.

J. E. Jewett, for the appellant.

Knapp & Caldwell, for the appellees.

WOODWARD, J. (1)—This court has decided that this manner of bringing a suit—this form and allegation—will not defeat it, and it is not a ground of demurrer, either in contract or in tort. Section 1676 of the Code, providing that civil actions must be prosecuted in the names of the real parties in interest, has reference undoubtedly, at least in part, to sections 949 and 952, which make claims assignable by writing, which before were not, so as to enable the assignee to sue in his own name. If, in a suit brought in the name of the assignor of a contract so assigned, it should appear that the demand was assigned, it would defeat the suit. If the contract is not, in fact, so assigned, it is not assigned at all, and then the suit is in the name of the real party in interest. What right the supposed beneficiary has, or what interest he acquired, under this form of allegation, and whether any, has not been determined, even in a case on contract.

But this is an action founded on a *tort*. Is a claim for tort assignable; or was it so, before the Code? There has been no case raising the question, that we are aware of. If it be not assignable, this action would seem to stand, in respect to this question, upon the same ground with one brought, in like manner, upon a contract not assigned in fact.

The common law doctrine concerning the equitable assignment of claims, is abrogated by the above provisions of the Code, and such assignments are placed upon a legal basis; and it seems to the court, that the view taken here, is the natural consequence of that change; and that the words "for the use of," &c., must be held, either to be mere surplusage, or to

(1) *ISELL*, J., dissenting.

mean much more than we know how to give effect to under our statute.

The decision of the District Court is sustained, and the cause is remanded for further proceedings.

ISBELL, J., dissenting.—I know of no precedent or principle that will justify the above ruling, in an action founded on *tort*. The provision of the Code, § 1676, that "civil actions must be prosecuted in the name of the real parties in interest, except in the case of a trustee or other person legally authorized to sue for another, and except where otherwise provided for by law," I understand to mean, that the person's name must be used in whom the *legal* interest is vested; and that fictitious names, as in the old action of ejectment, are to be no longer countenanced. I also understand, that the effect of the words "who sues for the use and benefit of the Des Moines navigation and railroad company," is to give to the company the proceeds of the collection; and that whatever recovery may be had, will not be had by the state in her own right, but as trustee for the company. I know of no means whereby the state may become a trustee, for the recovery of money for a trespass committed on her own lands.

BARNES v. DAVIS *et al.*

An action of trespass *quare clausum fregit*, so relates to real property, as to authorize the prosecution of the suit in the county where the realty is situate, even though the defendant may reside in a different county.

Appeal from the Iowa District Court.

THIS suit was instituted in Iowa county. The petition contains two counts: one for breaking and entering the *dwelling-house* of the plaintiff, *situate* in Iowa county; and one for trespass to his person. The defendants reside in Johnson county, and on their motion, the venue was changed

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to that county, and damages awarded to the defendants for attending in the wrong county. From this ruling the plaintiff appeals, and assigns the change of venue as error.

W. Penn. Clarke, for the appellant.

Although the petition in this case embraces two causes of action, the only question presented is, was the case, with reference to either, properly brought in Iowa county, the defendants residing in another and different county; for if the action had to be brought in Iowa county, as to either cause of action, the motion was improperly sustained. The first cause of action—that embraced in the first count of the petition—was for a trespass to real estate—trespass *quare clausum fregit*—and that action must be brought in the county where the realty is situate.

1. At common law, the action of trespass *quare clausum fregit*, is local, and must be brought in the county where the trespass was committed. 4 Bouvier's Institutes, 34; 2 Stark on Evidence, 802; 1 Chitty on Plead. 298. In *Livingston v. Jefferson*, 4 Hall's Am. Law Jour. cited in 9 Bacon's Abridg. 501, it was decided, that a circuit court of the United States, cannot take cognizance of an action of trespass *quare clausum fregit* committed on lands within the United States, and out of the district in which the court is held. See also, *Champion v. Doughty*, 3 Harrison, 3; and *Haim v. Rogers*, 6 Blackf. 559, where the very point is decided. Aside from these authorities, our own Supreme Court have decided the question. *Chapman v. Morgan*, 2 Greene, 374.

2. The Code does not change the common law, upon this subject. Section 1701 of the Code provides, that "except where otherwise provided, *personal* actions must be brought in a county wherein some of the defendants actually reside." If this provision stood alone, it would be against us, as trespass *quare clausum fregit* is classed among personal actions; but a succeeding section (1703) of the same chapter, provides, that "in cases of attachment of property, when the defend-

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ant is not served, or cases where the suit is brought to obtain possession of personal property, or to enforce a lien or mortgage, or where it relates to real property, it may be brought in any county where the real property, or any portion of it, lies," &c. This leaves the matter where it stood at common law. The suit, then, was properly brought in Iowa county, and the court erred in ordering the change of venue on the grounds stated in the motion.

Rush Clark and J. D. Templin, for the appellees.

The appellant claims that this is a *local* action. The distinction of *local* and *transitory*, as applied to civil actions, is abolished by the Code. Local actions, at common law, were such as had to be tried in the place where the cause of action arose. No action can be said to be strictly *local*, under the system of practice instituted by the Code, since, in any civil action a change of venue may be granted on proper showing. Code, chap. 102. Many of the rules of practice, and the reasons which gave rise to the distinction, are now obsolete, and there are now no reasons why actions should be tried in the particular county where the cause of action arose, except in those cases—the fewest number—when particular property is affected by the suit or concerned therein, or is the subject matter of the action. It is certainly reasonable, that such proceedings as actions to try the right to property for mechanic's lien, foreclosure of a mortgage, or partition of lands, where particular property is the object of the suit, should, for the sake of facility and the speedy acquisition of justice, be brought and tried in the county where the property is situate. But we can conceive of no reason why actions, which were denominated *local* under the old practice, should be held to be so now, for the purposes of trial or adjudication.

The venue, so far as necessary to be laid, is provided for in chapter 101 of the Code. The Code favors that locality which embraces the residence of the defendants, or some of them, giving the plaintiff a choice of venue only in those cases

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where the proceeding is partially or wholly a proceeding *in rem*, or "*relates to real property*." As trespass is a *personal* action, it remains only to be decided, whether the "suit brought by the plaintiff relates to real property." The appellant argues that this action "was for a trespass to real estate, trespass *quare, &c.*" The code abolishes all technical forms of actions and pleadings, and, therefore, knows no such action as "trespass *quare, &c.*" Every suit becomes a particular form of action in itself; and it will depend entirely upon the statement of facts, presented by a petition, whether the suit "relates to real property" or not. Under our practice, one suit may relate to real property, while another does not, although both might be subjects of the same form of action at common law. Unless the petition here, or the first count thereof, affects particular property, so that the property forms part, or the whole substance, of the issue to be tried, the suit cannot concern the property, nor be said to relate to the property.

There is not such a designation of particular property in this petition, as makes the suit *relate* to property. This petition is certainly sufficient for the purposes intended; but, surely, no issue could be taken here, which would try the title to property. In an action of trespass, "in describing the premises, the close or place, in which, &c., must be designated in the declaration by name, or abuttals, or other description." *Archbold's Nisi Prius*, 420. "*The dwelling-house of the said plaintiff, situate in Iowa township, in Iowa county,*" is not such a description of realty as would be requisite for legal proceedings. No issue could be taken upon the identity of property, by that description; and we think it would be the same, for the purposes of the suit brought in this petition, whether that dwelling-house proved on the trial, to be in the county mentioned or another. The property could not become a material issue, except as to the injury complained of. Although there are two causes of actions set up, there is no doubt, by a fair and natural construction, that the statement of facts refer to one entire act—the "breaking and entering the dwelling," for the purposes

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of search, and the imprisonment. A house is sometimes personal property, although a part of the realty in ordinary legal acceptance. The land includes the house on it, but the house does not include the land beneath and around it. And "the dwelling-house of the said plaintiff," as set out in this petition, may refer to any one of three or four houses belonging to the plaintiff, and situated in the same township. Under the system lately adopted in New York, such actions as were formerly denominated *real* and *mixed*, are classed as actions "*relating to real estate*," and under the name of *personal*, those which might be brought for the recovery of any debt or demand, or *for the recovery of damages only*. 1 Monell's Practice, 283.

We think, therefore, that the suit brought by the plaintiff, does not *relate to real property*; no more than an action for rent of a farm, or any other action, arising out of the property, but in no way affecting it, and in which the real property is not concerned in the issues to be tried. We think there is no doubt but that this suit might have been properly brought in Johnson county; and since there appears of record an original notice issued to Iowa county, and returned not found, we presume the suit was brought in Iowa county, under a mistaken supposition that some of the defendants were residents of that county. We submit, therefore, whether a suit brought for an injury done by entering the dwelling-house of another, and for false imprisonment, is such a suit as comes within the meaning and spirit of section 1703 of the Code, and in the language of that section, "*relates to real property*."

ISELL, J.—Should the venue have been changed? Section 1703 of the Code provides, that where the action "*relates to real property*," it may be brought in the county where the real property lies. The language of the petition, charging that the defendants, "with force and arms, at the county of Iowa, broke and entered a certain dwelling-house of the said plaintiff, situate and being in the township of

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Iowa, in the county of Iowa," and also charging the breaking of "five doors, belonging to the said dwelling-house," &c., clearly implies a trespass upon real property. Issue might have been taken upon the title. We hold, therefore, that the suit so related to real property, as to justify its prosecution in Iowa county, so far as relates to the trespass by breaking and entering the dwelling. As to the residue of the charge, no question is raised that demands our consideration.

The judgment of the District Court is, therefore, reversed, and cause remanded.

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The act entitled "An Act for the Suppression of Intemperance," approved January 22, 1855, is not in conflict with the constitution or laws of the United States.

The General Assembly cannot legally submit to the people, the proposition whether an act shall become a law or not.

The people have no power, in their primary or individual capacity, to make laws.

A statute void in part, is not necessarily void as a whole. If sufficient remains to effect its object, without the aid of the invalid portion, the latter only should be rejected, and the former allowed to stand.

The act for the suppression of intemperance, approved January 22, 1855, is a complete act in all its parts, without the eighteenth section.

Although the power of the judiciary to declare and hold an act of the legislature unconstitutional and void, is universally admitted, yet the exercise of that power, is considered of the most delicate and responsible nature, and is not to be resorted to, unless the case be clear, decisive and unavoidable.

It is the duty of the courts, to give to a statute such a construction, if possible, as will sustain it.

Where the language and provisions of a statute are consistent with a lawful end, and this is its apparent meaning, whilst another construction would give it an unlawful effect, it is the duty of a court to take that view which is lawful and consistent.

The whole of the act for the suppression of intemperance, approved January 22, 1855, is not rendered invalid, even though the submission to a vote of the

2	165
78	325

2	165
80	630

2	165
83	630

Iowa.	
2	165
84	266

2	165
191	197

2	165
94	10
94	24

2	165
111	8

2	165
117	90

Iowa	
2	165
119	267

2	165
133	529

Iowa	
2	165
137	475
137	478
137	483

2	165
140	481

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- people, as provided for by the eighteenth section of the act, should be held unconstitutional.
- The eighteenth section of the act did not submit to the people the question, whether the act should become a law or not, and is not unconstitutional.
- The statute does not embrace more than one object, nor objects not expressed in the title; and is not in violation of the twenty-sixth section of the first article of the constitution, which provides that every law shall embrace but one object, which shall be expressed in the title.
- The act has been published, as required by the constitution of the state of Iowa.
- A particular description of the place to be searched, or the property to be seized, is required by the act for the suppression of intemperance; and the charge alleged against the defendant is to be distinctly and fully stated.
- The words "as particularly as may be," in the ninth section of the act for the suppression of intemperance, convey the idea of the greatest degree of certainty in the description of the place to be searched, or the property to be seized.
- Under the statute, it is necessary to inform the defendant of the charge alleged against him, and it allows him to be confronted with the witnesses against him.
- The statute does not authorize a destruction of property, without notifying the defendant; nor does it authorize a forfeiture and destruction of private property, without trial, and as a penalty for crime, which need not be proved.
- The act to incorporate the city of Keokuk, approved December 13, 1848, and the act amendatory thereof, approved January 22, 1853, confer upon the mayor of the city of Keokuk, the jurisdiction of a justice of the peace, under the criminal laws of the state; and the power thus conferred, is not in conflict with the third article of the constitution, which provides that no person charged with the exercise of powers properly belonging to one department of the government, shall exercise any functions appertaining to either of the others.
- The seal of the city of Keokuk is a corporate seal, and not the seal of the mayor, when he acts as a justice of the peace under the laws of the state.
- Section 175 of the Code, which provides that no sheriff, deputy sheriff, coroner, or constable, shall appear in any court as attorney or counsel for any party, &c., does not prohibit peace officers from making complaint of the violation of the penal laws of the state.
- Where the defendants in a criminal proceeding before a justice of the peace, appeared and had a trial, without objecting to the information or warrant; and where, on appeal, the objection to the information and warrant was first raised in the District Court, which objection was not included in the affidavit for the appeal, and was overruled by the District Court; *Held*, That the defendants having appeared before the justice, and had a trial, without testing the sufficiency of the information and warrant, and it not being assigned as an error in the affidavit for the appeal, the objection was properly overruled.
- And where on appeal in a criminal case, the District Court refused to grant a new trial on the errors assigned in the affidavit of appeal, and refused the

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defendants a trial by jury; *Held*, That the District Court did not err in refusing a trial by jury.

Section 3361 of the Code, is applicable to cases under the act for the suppression of intemperance, and is not superseded by section ten of that act.

An assignment of error as follows: "In overruling various other motions and questions apparent upon the record, which is made part and parcel of this assignment of errors," is too broad and indefinite to be considered by the Supreme Court.

Error to the Lee District Court.

THIS is a proceeding under the act for the suppression of intemperance, commenced before the mayor of the city of Keokuk, on the following complaint:

*The State of Iowa, Lee County, ss:—*Personally appeared before the undersigned, mayor of the city of Keokuk, in said county, James R. Judd, James Knight, and Mark P. Landon, residents of said county, who each being duly sworn, depose and say, that they have reason to believe that intoxicating liquors, viz.: whiskey and ale, and porter, and lager beer, and strong beer, are kept, and intended for sale, in violation of the law of the state of Iowa, entitled "an act for the suppression of intemperance," in the buildings upon the easterly part of lot two in block number one hundred and eighty-six, in the city of Keokuk aforesaid; said premises being occupied, and said liquors owned and kept, by a person of the name of Geofas Santo. And the said James R. Judd, one of the defendants aforesaid, further deposes and declares, that he has reason to believe, and does believe, that since the first day of July, A. D. 1855, intoxicating liquors have been sold in said house or building, and in some dependency thereof, in violation of the law of the state of Iowa, entitled "An Act for the Suppression of Intemperance," by the said Geofas Santo, and by his consent, and by his permission.

(Signed,)

JAMES R. JUDD,
JAMES KNIGHT,
M. P. LANDON.

Subscribed and sworn to before me, }
this 28th day of July, A. D. 1855. }

D. W. KILBOURNE, *Mayor of the city of Keokuk.*

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Upon this information, a warrant was issued and delivered to the marshal of Keokuk, commanding to search the premises, and seize the liquor described in said information, which warrant was returned on the 30th of July, 1856, with the following return indorsed thereon: "I did on the 28th day of July, A. D. 1855, search the within-described premises, and seized and have now in charge, the following described vessels of intoxicating liquor, viz.: eleven iron-bound kegs, each having the letters J. B. L. marked upon them, and containing liquor, beer and strong beer; also one wooden-bound barrel, having the words, 'double rectified whiskey,—Warsaw, Ill. D.' marked upon it, containing whiskey, and found on the premises occupied and kept by one Geofas Santo.

"M. P. LANDON,

"Keokuk, July 30th, 1855. *Marshal of the city of Keokuk.*"

A notice was then issued, directed to Geofas Santo, and all whom it may concern, "requiring them to appear before the mayor on the 8th day of August next, and show cause why the vessels and liquors should not be forfeited, and also a venire for a jury, both of which were returned duly served. At the time fixed for the hearing, the defendants appeared, claimed to be the owners of the liquors, and their attorney filed a motion to dismiss the proceedings, containing *seventeen* reasons, which motion was overruled. The grounds of this motion will be found sufficiently stated in the opinion of the court. Other motions were made to dismiss the cause, because the court had no jurisdiction, and on other grounds, fully noticed in the opinion, all of which were overruled. Separate trials were refused a portion of the defendants, and the cause was submitted to a jury, who returned a verdict, that the liquors were forfeited, and at the time of their seizure, were kept to be sold in violation of law. Upon this verdict, the mayor entered a judgment, that the said liquors were forfeited, and that they be destroyed, and that the defendants pay the costs. The defendants then filed their affidavit for an appeal, alleging as error the overruling of their several motions, and filed their bond.

In the District Court, the defendants moved that the cause

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be stricken from the docket, and the proceedings quashed, for the following reasons:

1. Because the information and warrant are void, inasmuch as neither the place to be searched, nor the intoxicating liquors to be searched for and seized, are particularly described. Code, § 8293; also Const. Art. 1, § 8.

2. Because the complaint was made, and the warrant issued, in violation of section 175 of the Code of Iowa, it being admitted and proved, that Mark P. Landon, one of the persons who signed and subscribed the complaint or information, was at the time of signing and subscribing said information, and ever since hath been, and now is, city marshal of the city of Keokuk, and by the 11th section of an act, entitled "An Act to amend an act entitled an act to incorporate the city of Keokuk," the city marshal of said city of Keokuk shall, by virtue of his office, be a constable of Jackson township.

3. Because the information was not made before a justice of the peace, or the warrant issued by a justice of the peace, but the information was made before, the warrant, and notice issued, and judgment entered up by, the mayor of the city of Keokuk, who has no power or jurisdiction, or authority whatever, over or in proceedings prescribed in the 9th, 10th, and 11th sections of the act of the legislature, entitled "An Act for the Suppression of Intemperance," under the provisions of which these proceedings are professedly and really instituted.

4. Because the act of the legislature of Iowa, entitled "An Act for the Suppression of Intemperance," under which these proceedings are instituted and prosecuted, is null and void, being passed in violation of the constitution of the state of Iowa, and constitution and acts of Congress of the United States.

This motion having been overruled, and the court, having refused a new trial, on the errors assigned in the affidavit of appeal, and refused a trial by jury, which was demanded by the defendants, proceeded to affirm the judgment of the mayor, and rendered a judgment against the defendants for costs in

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both courts. From this judgment, the defendants have sued out their writ of error, and in this court allege the following errors in the proceedings below :

1. In overruling the motion to dismiss the proceedings.
2. In refusing the defendants a jury trial.
3. In affirming the judgment of the court below.
4. In adjudging that the liquors were kept for the purpose of being sold, in violation of law.
5. In adjudging that the liquors were forfeited.
6. In ordering the defendants to pay the costs of appeal, as well as those below.
7. In ordering that the liquors be destroyed.
8. In overruling various other motions and questions, apparent upon the record, which is made part and parcel of this assignment of errors.

Marshall & Moss, for the plaintiffs in error, contended :

I. The District Court erred in overruling the motion to dismiss :

1. The information and warrant are void for uncertainty, and not containing matter required by the "Act for the Suppression of Intemperance." See the act, § 9, Am. L. Reg., June number, 1854.
2. The warrant was issued, and the complaint made, in violation of the 175th section of the Code of Iowa, which provides that "no sheriff, deputy sheriff, coroner, or constable, shall appear in any court as attorney or counsel for any party, nor make any writing or process to commence any suit, or be in any manner used in the same; and such writing or process made by any of them shall be rejected." Mark P. Landon, one of the informants, who signed, subscribed, and filed the information in this proceeding, it is proved and admitted, and so appears of record, was city marshal of the city of Keokuk; and, by virtue of his said office of city marshal of the city of Keokuk, a constable of Jackson township, qualified and sworn into office as said constable. See § 11 of Amended Charter of the city of Keokuk, Stat. 1853, 186. A complaint made by one of those

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officers is void, and must be rejected. The signing and filing of said complaint, is making a writing or process to commence a suit. The complaint certainly would not have been good, without his affidavit and signature, as only two informants would have been left, and the act of the legislature, under which the case is brought, requires three. The 175th section of the Code extends to criminal, as well as civil process. It was intended to prevent those officers from hunting up cases, and instituting suits, for motives of gain. Other states have similar provisions in their statutes. Connecticut has the following: "If any sheriff, deputy sheriff, or constable, shall draw or fill up, any writ, process, or declaration, except in his own case, it shall abate." Revised Statutes, 1849, 582. This statute has always been held to apply to criminal cases. A criminal proceeding is, unquestionably, a process.

3. *The warrant was not lawfully served.* Mark P. Landon, who served the warrant, is one of the informants. A warrant served by a prosecutor, is not legally served. It must be served by an officer, or person indifferent, as between the parties. An act of a legislature, authorizing a man to sit in judgment on his own cause, is void, as being against common right and reason. *Calder v. Bull*, 3 Dall. 386; *Dr. Bonham's Case*, 8 Rep. 118; *Reid v. Wright*, 2 G. Greene, 150; *Taylor v. Porter*, 4 Hill, 140; *Rice v. Foster*, 4 Harr. (Del.) 477. The same rule holds good as to service of process. "If a person not authorized to make service of process, should serve a warrant, such service is illegal, and a judgment rendered thereon, is extra-judicial and void. *Case v. Humphry*, 6 Conn. 180; *Eno v. Frisbie*, 5 Day. 122. The defendant, to take advantage of the matter, is not obliged to plead it in abatement; but the court will *ex officio* dismiss the writ. Even if a statute contemplated a plea in abatement, still it would not take away the common law remedy.

4. The mayor of the city of Keokuk has no jurisdiction, power, or authority, over, or in, proceedings prescribed or authorized by the 9th, 10th, and 11th sections of the act of the

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legislature, entitled, "An Act for the Suppression of Intemperance," under the provisions of which these proceedings were professedly and really instituted. Now, the rule of law is, "that, statutes conferring jurisdiction, are to receive a strict construction." *Palmer v. Palmer*, 6 Conn. 409. The principles of construction applicable to remedial statutes, are inapplicable to statutes prescribing the jurisdiction of courts. *Ib.* 409. In relation to superior courts, or courts of record, the law is, that nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court, but that which is expressly alleged. *Beaubien v. Brinkerhoff*, 2 Scam. 269. No presumption is to be made in favor of an inferior tribunal. Its jurisdiction must appear on the face of its proceedings. 5 U. S. Dig. 249. If a statute create a new offence, or cause of action, and provides that a particular tribunal shall take cognizance of it, no other court can enforce the law. *Aldrich v. Hawkins*, 6 Blackf. 125. A court of inferior jurisdiction, cannot take cognizance of an action to recover a statute penalty, unless jurisdiction is given in express terms. *Bowers v. Greene*, 1 Scam. 42.

9. The act under which these proceedings are professedly instituted and prosecuted, entitled, "An Act for the Suppression of Intemperance," is null and void, being passed in violation of the constitution of the state of Iowa, and the constitution and acts of Congress, and of common right and reason. Statutes inconsistent with the constitution of this state, or with the constitution of the United States, are void. If an act of the legislature is repugnant to the constitution, it is *ipso facto* void. 12 Wheat. 270; 2 Peters, 522. Statutes, or acts of legislation, against common right and reason, are void. *Dr. Bonham's Case*, 8 Rep. 118. *Lord Coke*, in the last-named case, gives some twenty-three authorities for the position that an act of parliament, against common right and reason, is void.

II. Now, the plaintiffs in error in this case claim, that the

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"Act for the Suppression of Intemperance," is null and void.

1. It was passed in violation of those formal rules required by the constitution of the state of Iowa, to be observed in the passage of statutes. The constitution prescribes, *first*, That every law shall be so framed as that it shall "embrace but one object, which shall be expressed in the title." Const. Art. 3, § 26. *Second*, The legislative authority shall be vested in a Senate and House of Representatives, which shall be designated as the "General Assembly of the State of Iowa," and that bills may originate in either house, except bills for revenue, which shall always originate in the House of Representatives, and may be amended, altered, or rejected by the other; and every bill having passed both houses, shall be signed by the speaker and president of their respective houses. Every bill which shall have passed the General Assembly, shall, before it becomes a law, be presented to the Governor. If he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated, which shall enter the same upon the journal, and proceed to reconsider it; if, after such reconsideration, it again pass both houses, by yeas and nays, by a majority of two-thirds of the members of each house present, it shall become a law, notwithstanding the Governor's objection. If any bill shall not be returned within three days after it shall have been presented to him, Sundays excepted, the same shall be a law, in like manner as if he had signed it, unless the General Assembly, by adjournment, prevent such return. Const., Art. 3, §§ 16 and 17.

Every law must be so framed as that it shall,

1. Embrace but one object.

2. Shall not contain any object not expressed in the title. To ascertain the meaning of the term "object," as used in the constitution, we must resort to some rule of construction. That rule, furnished by the Code of Iowa (section 26), makes it necessary for the court to construe words according to the approved usage of language, and the word object, as used in the 26th section of 3d article of the constitution, con-

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strued according to that rule, must be declared by the court to mean "*something* presented to the mind—that to which the mind is presented for accomplishment or attainment."—

Webster. Any law, or rather act, of the legislature, so framed as to present more than one subject to the mind for accomplishment or attainment, is null and void, and courts are bound to refuse them their sanction. The act of the legislature, entitled, "An Act for the Suppression of Intemperance," is objectionable, in being so framed as to embrace more than one object. Each one of its eighteen sections, present to the mind distinct subjects for attainment, neither of which are logically and legitimately related to each other, or so dependent upon each other, as that one cannot be carried out, without the aid of the other. The act provides for the punishment of drunkenness; for the prohibition of the manufacture and sale of intoxicating drinks; for declaring liquors, kept for sale in a certain manner, a public nuisance; for the appointment of county agents; for the establishment and furnishing of a county liquor shop; for a method of rendering accounts; for a new and extraordinary liquor proceeding; for declaring buildings a public nuisance; for declaring lands a public nuisance; and for some eight or ten distinct objects, which will be more distinctly noticed in another part of the argument.

The "Act for the Suppression of Intemperance" contains objects not expressed in the title. The title declares the object of the law to be the "suppression of Intemperance." No matter or subject not legitimately, and with certainty, promoting that end, and tending to that ultimate purpose, can lawfully or constitutionally be included in the act. The word "Intemperance," according to the approved usage of language, means "want of moderation or due restraint;" excess in any kind of action or indulgence—habitual indulgence in drinking spirituous liquors.—*Webster*. Whatever is included in that act, which is not logically directed to the suppression of excessive and habitual indulgence in drinking spirituous liquors, is illegally there, and renders it liable to the objection of "*embracing objects not expressed in the*

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title." The professed object of the act is, not the suppression of the traffic in intoxicating liquors, or the destruction of liquors kept for sale in a particular manner, or to prohibit its manufacture; but to suppress the habitual indulgence in drinking spirituous liquors. Neither is the "expressed" object of the act, the suppression of the traffic in strong drinks, or even of the habitual indulgence in drinking strong drinks; and all those provisions tending to, and providing for, the destruction of spirituous liquors, or for the suppression of the traffic in those articles, or the suppression of the habitual indulgence in drinking strong drinks, are unconstitutionally inserted, and under the act, void. Out of some twenty or more objects included in that act, one only is fairly indicated by its title, and that is the provision which provides for the punishment of drunkenness. See Amer. Law Reg. August, 1855. As to constitution of jury, see 1st How. (Miss.) 163; 8 English, 436. Submitting the act to the popular vote was unconstitutional. Amer. Law Reg., Sept. 1853; *Ib.* Aug. 1854; *Rice v. Foster*, 4 Har. 477; *Parker v. Commonwealth*, 6 Barr, 509.

J. P. Hornish, for the state.

This case raises the question of the constitutionality of the act of 1855, "for the suppression of Intemperance." The first thing to be determined is, the sufficiency of this law, for if it is unconstitutional, then all further inquiry into the merits of this case, is useless. Is this law unconstitutional? "Pursuing and obtaining safety and happiness," as well as enjoying and defending life and liberty, and acquiring, possessing, and protecting property, are among the inalienable rights of man. Const., Art. 1, § 1 and 2. "The government may by general regulations *interdict* such use of property, as would create *nuisances*, and become *dangerous* to the lives, or *health*, or peace or comfort, of the citizens." 2 Kent, 840. The regulation of the sale of intoxicating liquors, is a police regulation, and the legislature may prohibit the sale altogether, and declare the traffic a nuisance. 5 How. 528;

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King and Cooper v. The President and Trustees of the town of Jacksonville, 2 Scam. 305; *Bepley v. The State*, 4 Ind. 264; *Beal v. The State*, 4 Blackf. 107; 6 Greenleaf. 412; 9 Wheat. 208; 2 Amer. Law Reg. 466—this is the Massachusetts case, and although it holds that law unconstitutional in many respects, yet it concedes this power to the legislature. *Jones v. The People of the State*, 14 Ill. 196; 4 U. S. Stat. at large, 732; where the United States prohibited the sale, and declared the liquor forfeited. The legislature is to be the judge of what is a proper subject of legislation, and of the policy and expediency of laws. Liv. Law Mag. 124.

It is within the power of the courts to abate nuisances, or even for individuals, on their own suggestion. This power has never been doubted. 3 Cal. 72; *Meeker v. Van Rensselaer*, 13 Wend. 397; 2 Bouv. Inst. 514; 3 Black. Com. 5. The power to declare a nuisance admitted, the power to abate follows, as a necessary consequence. An offence being created, the addition of the necessary means for detecting the offenders and punishing the offence, must be inherent in the body having the power to create the offence, and they are to be the judges of what means are necessary; and the courts should not interfere, although they should appear extraordinary in some respects, so long as they do not plainly violate constitutional rights. The right of the legislature to declare property used for, or in the commission of crime, forfeited, has never been successfully denied. It has always been practiced, and even at common law, before justices of the peace, by summary process. 4 Blacks. Com. 281. Gambling devices are declared forfeited under our Code. § 2722; 1 U. S. Stat. at large, 349, 677; 4 U. S. Stat. at large, 732; 2 How. 231.

To authorize articles used in, or suspected to be used in, the commission of crime, to be forfeited and destroyed, is not new or unusual. 1 Chitty's C. Law, 65. Neither is the search and seizure authorized, unusual or unreasonable. 10 Johnson, 263; 11 Johnson, 500; 13 Mass. 286; 1 Conn. 40; 2 Starkie's Ev., old edition, 438; 33 Maine, 564; 2 Wheat. 246; 2 Peters, 358. It is somewhat singular, that

the seizure of a bottle, a jug, or a barrel, and its contents, should be considered very extraordinary or unusual, when it is admitted that they are the instruments of crime, and declared a nuisance, when kept in certain places and conditions. Is there any good reason why the instruments of crime, if they are productive of crime, should be any more regarded, than the person of the criminal? He may be searched for and seized, at any place, and at any time.

But it is said the power to enact this law was delegated to the people. Where is the provision delegating this power to the people? They cannot get it, by implication. To make a law depend upon a future contingency in relation to the time when it shall take effect, cannot be said, with any degree of reason, to be delegating legislative power. *Liv. Law Mag.*, January, 1855, 13; 20 *Ohio*, App. 1; 1 *Ohio*, N. S., 77. This law does not, however, depend upon this section for its validity. It is a perfect law without it, and would not be affected by being found unconstitutional in this respect. Part of an act may be unconstitutional, and part constitutional. 16 *Pick.* 87.

This law, it is said, has more than one object. It is difficult to see in what respect it has more than one. The provision for taking the sense of the people, is nothing more than making provision for its publication would be. Is there anything in it, that does not relate to the same subject matter? If not, the act is not at fault in this respect. 5 *Ind.* 41.

The rules of evidence are changed, it is said. We cannot see in what respect. But if it were the case, is it not within the power of the legislature to modify the rules of evidence, by general and uniform laws. *Code*, § 926; 1 *United States Statutes at large*, 677, § 68; 1 *Cond. Rep.* 594; 16 *Peters*, 342; 1 *Greenleaf's Ev.* § 33; *Archbold's C. Plead.* 124.

In conclusion, upon the general character of the law, it may be remarked that the law of Iowa differs, in many important particulars, from the Massachusetts act: 1st. In the requisites of, and for, the warrants; 2d. In the description

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of the places and the articles to be searched for; 3d. In naming the person in whose possession these articles are found; 4th. Notice to the owners; 5th. Day in court; 6th. Trial by jury; 7th. Declaring the articles when kept in certain places a nuisance, and the keeping an offence.

The other objections arising in this particular case, are: 1st. To the jurisdiction of the mayor of the city of Keokuk over this offence. The mayor, by virtue of the city charter, (§ 23,) has the same jurisdiction of criminal offences against the state of Iowa, as justices of the peace, and the proceedings before him are to be the same. By the statute of 1853, (§§ 12 and 13,) his jurisdiction is enlarged, and made to extend to all offences against the laws of the state, now in force, and hereafter to become in force. The only question is, is this a criminal offence? If so, then he had power to punish it, and to issue his warrant, the same as a justice of the peace, to bring the accused before him. It will not be disputed, that the mayor has power to issue search warrants for gambling devices, and yet the language of the law is the same as in this act. Code, § 2722, 1855. A special justice of the peace of the city of New York, has power to issue a search warrant, although it is a common law writ, and he is a creation of statute not known to the common law. 10 Johnson, 263.

The city marshal being *ex officio*, a constable, was one who joined in this affidavit before the mayor, upon which the warrant issued, which is forbidden by the Code, (§ 175,) as is alleged. To say that a peace officer has not the power, or the right, to do what is one of his highest duties, is simply absurd. This section was intended to prevent this class of officers from acting as attorneys, or agents for others, in the courts; but most clearly was never intended to prevent them from arresting, and causing to be arrested, known offenders against the laws. All objections to the sufficiency of the information and the warrant, are cured by the verdict. The goods will be held and forfeited, although the original seizure of them may have been a trespass. 16 Peters, 342; 13 Mass. 286.

Many other objections are urged against the proceedings, which do not present themselves in such a form as to come under the supervision of this court. To the objection of being tried jointly, I would answer, that all the parties came by the same attorneys, and joined in the same plea of not guilty, and that it was a matter of discretion with the court, to grant or refuse separate trials. Nor is a court bound to hear a case alone. A jury trial is a right that may be demanded, but not refused. To the objections to the jury, I might say, that six men constitute a jury under our constitution, in cases before inferior courts. Facts passed upon by them, are just as binding, as if their number was greater. It is expected that every case shall be decided justly, and most certainly, the framers of the constitution intended and expected that six men were capable of dispensing justice, or they never would have constituted them a legal jury. Inferior courts are established, not for the purpose of experimenting with, but for the purpose of determining rights. But it does not appear that the jury were objected to on account of their number, which is necessary, in order to give the party the benefit of a jury of a greater number. 1 Wisconsin, 401.

But to return to the questions at issue, for this is a matter outside of the record. The only question remaining is: Did the court below err, in not granting a trial on the merits in this case? The right of appeal, does not imply the right of a trial by jury. The right of appeal from the District to the Supreme Court, is as much of a right, as it is from a justice's court to the District Court, and who would contend for a moment, that the appellant has a right to a jury trial in the Supreme Court? One jury trial is all that the law contemplates, unless it appears from the affidavit assigning errors, that injustice has been done to the defendant by the jury. If the errors assigned are mere questions of law, why try the case again upon its merits? All the errors complained of in this case, are errors of law, as appears from their own affidavit. The Code has wisely, in such cases, provided for passing upon such errors, without granting a new trial upon the

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merits. The whole complaint in this case is against the law, and not of the facts found under the law.

David C. Cloud, attorney-general, for the state.

Presumptions are always in favor of the constitutionality of a law, unless its unconstitutionality is clearly demonstrated, and courts will not declare a law unconstitutional, unless there is an actual conflict between the act and the constitution; a doubtful case will be decided in favor of the act of the legislature.

It is not to be expected that the constitution of a state will define all the powers of the legislature; nor is it for a moment to be presumed, that the framers of the state constitution could, by express articles, definitely prescribe legislative action upon any particular subject, much less upon all the numerous subjects which present themselves to a legislative body. Such a constitution can only prescribe *certain general rules* of action, and leave the details with the legislature; and if the legislature does not transcend its power, so far as to remove all doubt from the mind of the court, its acts cannot be declared unconstitutional; the court may have doubts as to the constitutionality of a law, yet a doubtful case will not render it unconstitutional.

How far is the legislative action defined or restricted, by the constitution? Article third of the constitution, is the only one that is devoted to the legislative department of the government. Section first of the said article, invests the legislature with authority, and declares what shall be the style of their acts. The twenty-fourth section of said article, directs how money shall be drawn from the treasury; section twenty-six declares, that every act shall have but one object, which shall be expressed in the title; section twenty-seven provides for the publication of the laws; section twenty-eight and twenty-nine prohibits legislative action in matters of divorce and lotteries; and all the residue of the article is devoted to the election and qualification of members of the legislature, their course of procedure in the enactment of laws, and directions for the taking of the cen-

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sus, making apportionments, &c. The general power of the legislature, upon other subjects, is not *defined* or *restricted*. It is left with the legislature to define crimes, and fix the punishment; and if, in the exercise of the discretion which it possesses under the constitution, it has declared the keeping and selling of intoxicating liquors, or any other acts, not before considered as criminal, to be crimes, it does not follow that such declaratory enactments are unconstitutional, unless they are expressly prohibited by article third of the constitution, or unless such acts conflict with the bill of rights, as set forth in article first of the constitution. I apprehend, that in this particular, the constitution of a state differs from the constitution of the United States.

By the constitution of the United States, the powers of Congress are clearly defined, and any exercise of a power not expressly given to it by the constitution, would be void, for the reason, that all the powers not expressly given to the government of the United States by the constitution, are reserved to the states; and while it would be the duty of the courts to declare an act of Congress void, for the reason that it is not within the scope of enumerated powers, a different rule will apply, when adjudicating upon an act of a state legislature, as all the acts of the legislature, be they ever so absurd, are constitutional, *if not prohibited by the constitution in such unequivocal terms, as to remove all doubts from the mind of the court.*

Upon this point, I would direct the attention of the court, to the case of "*Cooper v. Telfair*," 1 Cond. Rep. 211. In the opinion delivered by the court, in this case, they say, that "the presumptions, indeed, must always be in favor of the validity of laws, if the contrary is not clearly demonstrated;" and that "the general principles contained in the constitution, are not to be regarded as *rules to fetter and control*, but as matters merely *declaratory and directory*."

In the case above referred to, the question was, whether the state had the power before the adoption of the constitution of the United States, to banish, and to confiscate property for treason. The court says, that "the power of con-

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fiscation and banishment, does not belong to the judicial authority, where process cannot reach the offenders; and it is a power that grows out of the very nature of the social compact, and must reside somewhere, and which is so inherent in the legislature, *that it cannot be divested or transferred, without an express provision of the constitution.*

If, without any express provision of the constitution for that purpose, a state legislature has power to banish a man for treason, and confiscate his property, has it not also the power to regulate the internal affairs of the state; to prescribe general rules of action for all the people therein; to declare new crimes, including the *crime* of making and selling intoxicating liquor, and as a punishment for the violation of its acts, can it not, when the constitution does not expressly restrict its powers, declare a forfeiture of those liquors, destroy them, and fine and imprison the offenders?

Where the constitution is silent, or where a reasonable construction of its provisions does not prohibit a certain act, can the performance of such act, be a violation of its provisions?

Does not the legislature possess absolute power over all matters not defined, directed, or restricted, by the constitution? "*The courts will not pronounce a legislative act void, for repugnance to the constitution, except in a clear case.*" See 2 Peters, 522; 12 Wheat. 270; 19 John. 58; 1 Cow. 550; 3 Dall. 386; 4 Dall. 309; 6 Cranch, 128.

"The constitutionality of a statute will be supported, unless its unconstitutionality is so obvious as to admit of no doubt." *The State v. Cooper*, 5 Black. 258; 4 Black. 107; 4 Indiana, 264; 4 Ill. 196; Am. Law Reg. Vol. II, No. 8, 466; 4 U. S. Stat. at large, 832; Liv. Law Mag., Feb. 1854, 124; 1 U. S. Stat. at large, 347.

If the third article of the constitution does not restrict the legislature, or prohibit the passage of a law of the character of the prohibitory law, do the provisions of said law conflict with the "bill of rights," as specified in the first article of the constitution? In section second of article first, it is declared, that "All political power is vested in the people;" that

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"government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require it." This section clearly vests in the legislature, as the representative of the people, the right to enact all such laws as it may deem necessary for the protection, security, and benefit of the people; and if, in the exercise of the discretion thus vested in the legislature, it judged that the "protection, security, and benefit of the people," demanded a prohibitory liquor law, said law can be no violation of this section of the bill of rights. Does it violate section eighth of the bill of rights? This section declares, that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the papers or things to be seized."

The legislature has, in the "prohibitory liquor law" (see section 9th of the law), directed the mode of procedure, in nearly the words of this section of the "bill of rights." It certainly has—in this liquor law—guarded against unreasonable searches and seizures, and against any encroachments upon the rights of the accused, leaving no discretion with either the informant or the magistrate; *there must be probable cause, before a warrant can issue.* The law declares the manufacture or sale of intoxicating liquors to be a crime, and also prescribes the penalty for its violation. The constitution vests in the people, the right to do any act, conducive to the public good. The legislature has the right, whenever the public good demands it, to restrict trade, to prescribe how and where certain articles shall be kept, and in cases of disobedience, it has the right to prescribe the penalty; and no persons disregarding the law, can complain of an infringement of their constitutional rights, if the mode of search and seizure of their property, is such as is prescribed by the constitution. Does the "seizure" clause of the law, conflict with section eighteen of the "bill of rights?" Does

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the law provide for taking private property for the public benefit, without adequate compensation for the same? I apprehend that this section does not apply to cases where property is seized for a violation of law. All persons are presumed to know the law; and if, in defiance of law, they commit an act, which the law says shall forfeit their right to certain property, can they then claim that their constitutional rights are invaded? If so, then there can be no fixed rule of action for the people, and every one must be his or her own judge, as to what may be their constitutional rights, and legislative acts will be of no force.

If a man so far disregards his duty to his fellows, as to use his property to their injury, and this, too, in violation of an express statute, can he successfully plead this section of the constitution? The constitutionality of laws creating offences, and prescribing penalties, including search, seizure, and forfeiture, has been established by the decisions of the highest courts in this country. See *Crowell v. McFadon*, 8 Cranch, 91; *Otis v. Watkins*, 9 Cranch, 337; *Otis v. Walter*, 2 Wheaton, 18; Act of Con., March 3, 1817, ch. 58; *Rose v. Himely*, 4 Cranch, 241-272; *The Mars*, 8 Cranch, 417; 1st U. S. Stat. at large, 677; Liv. Law Mag., Feb. 1854, 183; 16 Peters, 342; 3 Wheaton, 246; 4 U. S. Stat. at large, 733; 33 Maine, 564; 6 Cowen, 404.

It is contended that the law violates section 1st of the "bill of rights;" that it restricts the right of acquiring, possessing, and protecting property. To this, I answer, that while all men possess these rights under the constitution, yet no man can, in the exercise of what he conceives to be his constitutional rights, use his property, or enjoy it, in such a manner as to debar others of their rights. When the public good demands it, all are required to surrender certain natural rights, for the mutual benefit of the whole people. It is no violation of this section of the bill of rights, for the legislature to say, that one man shall not sell to another unwholesome bread, or meat, or that he shall not manufacture and sell intoxicating liquors; because, in the exercise of the discretionary power vested in the people of the state, by the

constitution, they have the right to say what laws shall be enacted for the "*benefit, security, and protection of themselves, and for the public good.*" When private interest comes in conflict with the public good, *private interest must yield, especially when that private interest comes in conflict with the law.*

The Code of Iowa defines nuisances, and provides for their abatement. This provision of the Code is but a reenactment of the common law upon this subject; a law that courts have always enforced. *Anything that is a nuisance, may be abated.* The prohibitory liquor law declares, that the keeping and selling of liquors, except as prescribed by law, *is a nuisance*, and provides for its abatement. The legislature, acting for the people, have said, that the *public good demanded* that this nuisance should be abated, and I cannot conceive how their acts upon this subject, are in conflict with any provisions of the constitution. The man who continues the manufacture and sale of liquors in defiance of the law, is guilty of a crime, and has the same right to complain of a restriction of his constitutional privileges, as the horse-thief who is caught in his peculiar acts, and punished for the offence. The liquor seller and horse-thief are both equally guilty of a violation of law, and both have the same rights under the constitution. The legislature has the right, under the constitution, not only to declare what is a nuisance, and direct its removal, but, if not expressly prohibited, it may "enjoin, permit, forbid, and punish; it may declare new crimes, and establish rules of conduct for all citizens in future cases; it may command what is right, and prohibit what is wrong." See *Calder v. Bull*, 3 Dallas, 386; 15 Wend. 397; 3 Cal. 72; Bacon's Abridgment—Nuisance; 3d Blackstone's Com. 5; 2 Bouv. Inst. 574.

If the positions I have assumed be correct, then the legislature has the right to prohibit the manufacture and sale of intoxicating liquors, for the reason that it is a nuisance; and it also has the right, under the constitution, to declare the making and selling of intoxicating liquors to be a crime. Does section 18 of the prohibitory liquor law, render it uncon-

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stitutional? The constitution prescribes the manner in which laws shall be enacted. The prohibitory liquor law was enacted in the manner prescribed by the constitution, independently of the provisions of section 18, and without this section, would have been published with the other acts of the legislature, and would have become operative at the time mentioned in this section. All that the constitution required, was observed, and without this section 18, it would have been a law of the state, on the first day of July, 1855.

Was the addition of this section an unconstitutional act? The enactment of it is neither directed or prohibited by the constitution, and so far as the law itself is concerned, it neither adds to, or diminishes it, in its operation. The law is not a *proposition* submitted to the people for their enactment, but rather a *law* enacted by the *legislature* in a constitutional manner, and then the question as to whether it shall go into operation, is left with the people. No law of a general nature takes effect as soon as enacted—something yet remains to be done; *it must be published*. When published it takes effect. The legislature directed, that in addition to the publication of this law, the people should vote upon it, and that if a majority voted in favor of prohibition, then the law was to go into operation, on the same day that it would have, if this section 18 had been omitted. I apprehend, that simply embracing within a law, a proposition which is not prohibited by the constitution, will not render the law unconstitutional. It is but the exercise of that discretionary power possessed by the legislature, a power which it must possess, and which cannot be taken from it, except by an express provision of the constitution. Although we may not readily see the object of certain provisions; although they are absurd, yet if they do not conflict with the constitution, they will not affect the law. *Where the constitution is silent, a law cannot be unconstitutional*. It must come in conflict with some provision of the constitution, before a court will pronounce it void. This section, not conflicting with any provision of the constitution, cannot prevent the operation of the law. In support of the

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position, I have taken upon this point, I would direct the attention of the court to the authorities referred to on the sixth page of this argument. Liv. Law Mag. Jan. 1855, 13; 20 Ohio, Appendix, 1; 11 Penn. 61; 1 Ohio, N. S. 77; 4 Indiana, 342; Am. Law Reg. No. 10 of Vol. II, 591; Am. L. R. Vol. I, No. 11, 661.

Admitting, for the sake of argument, that this section (18), is unconstitutional, does it render the law inoperative? Can an unconstitutional section appended to the end, but not affecting the operation of the law, destroy the law? I am aware, that the courts must so construe an act, that the whole may, if possible, stand; yet it is equally well settled, that where a part of a law is constitutional, and a part of it is unconstitutional, that part of the law which is constitutional, will be supported and enforced, if enough is left to carry out the object designed by the legislature. This section 18, appended to the end of the act, being unconstitutional, and constituting no part of the law, cannot affect the passage of so much as conforms to the constitution. Courts will disregard this section, for the reason that its enactment was not the exercise of any power vested in the legislature. Although in the enactment of the law, the legislature may have intended that its operation should depend upon an affirmative vote of the people, yet the court will disregard the intent as expressed in this unconstitutional provision, and will gather the mind of the legislature from so much of the law as is constitutional. In the case of *Campbell v. Union Bank*, 6 How. (Miss.) 625, it was decided, that "where portions of the law conflict with the constitution, and but a part is valid, the latter will be sustained and enforced, if it can be separated from that which is unconstitutional. If this decision is law, it applies with strong force to the law now under consideration. All that can be said of this 18th section is, that it is absurd. It neither makes the law better nor worse; and if my first proposition is correct, viz: "That courts will sustain a law, unless it is clearly unconstitutional," then I apprehend, that nothing in this 18th section, will destroy, or prevent the operation of the law now under consideration.

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If a majority of the people had voted against this law, would it not have become effectual and operative, notwithstanding such vote? I apprehend, that if it has all the constitutional requisites, the courts will decide in favor of its validity—unless courts should say that we are returning to the first principles of a *democracy*, and that the people themselves, instead of their representatives, possess the law-making power—for the reason, that a vote of the people cannot be considered essential, being an act void of power for good or evil. Aside from the provisions of the act itself, did it not become a law of the land, after publication, by virtue of section 22 of the Code of Iowa? By virtue of this section, which is not repealed, or even suspended, if the 18th section of the prohibitory law is unconstitutional, the law was in force on the first day of July, A. D. 1855. This provision of the Code, is the law of the land, and applies as forcibly to this act of the legislature, as to any other; and the mere fact that the legislature attempted to suspend it, by an unconstitutional act, cannot affect its operation as a law. It must apply to the prohibitory law, and thus carry out the wish of the people, as expressed by their representatives in its enactment, and by themselves at the ballot-box.

Does the law contain more than one object? Is anything contained therein not expressed in its title? I think not. The whole act has reference to but one subject, viz: "The prohibition of the traffic in liquors." The vote of the people provided for, is upon this subject, and none other. All the provisions of the law, from section one to section eighteen, refer to the same object. If the law provided for a vote of the people upon any subject disconnected with, or independent of, the matter legislated upon, then, indeed, might it become a question for the consideration of the court. But where all that is done, or to be done, refers to the same subject matter, I cannot conceive how a court can, for a moment, seriously consider this proposition. I submit the case with the fullest confidence, that the positions I have assumed are in accordance with the decisions of other courts; and with the hope that the Supreme Court of the state of Iowa,

will decide in favor of the validity of the *Prohibitory Liquor Law*.

WOODWARD, J., (WRIGHT, C. J., dissenting.)—This case arises under the act entitled: "An act for the Suppression of Intemperance," approved January 22, 1855; and thus are raised among us, some interesting questions, which have been so considerably discussed in several of our sister states. These questions are approached with all the sense of responsibility, and with all the solicitude for the attainment of right, which belong to their nature and their importance. Such are their well known relations, and such the interest felt by the public in the possible fate of this act of the General Assembly, that these are the last questions, and this the last occasion, upon which we should venture to indulge in theorizing, or to reason upon merely theoretic grounds. This mode of treating the subject, would be not only unsafe for a judicial tribunal, but also unsatisfactory to other minds. Such has been found to be the case, in respect to several opinions upon some one or other of the questions involved.

All acknowledge the great principles, and probably the lesser rules also, by which these cases must be tried; but the main difficulty in this, as in many legal matters, lies in the just and true application of those principles and rules, about which there is no dispute. To make this just application in the matter at bar, it is more than usually necessary to keep near to, and within sight of, the well known shores; to sail in waters which have been often navigated, and not launch out into the broad sea of speculation upon human rights. That which all the states have been accustomed to do—those things which have commonly been held right—those decisions which courts have made in past time, in reference to other subjects, of an analogous nature, or involving similar principles—must be our guides. This is the only course which will satisfy the mind of the lawyer, or of any other thinking man.

It is often true, that a proposition is seen, felt, and admitted to be true, whilst it is difficult to point out the process of

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reasoning which leads to, or supports it, or to answer arguments which may be urged against it. This is true of many of the maxims lying at the basis of our political being. Who would doubt the proposition, that any one of our state governments, has the rightful power to protect itself or its public, the community, from the evils of pauperism, immorality, and crime? and yet how extensive and how difficult the range of argument through which the question carries us. The states have always exercised this power, and it has not been questioned, until it came to be applied to intoxicating liquors, the vast evils of the use of which, have been more especially observed within the past generation. If the states have not this power rightfully, the statute books of all of them, are lumbered by a mass of matter which has no place there; and if the power cannot be applied to this subject, it will be difficult to show the reasoning by which it can be applied to some others, to which it has always been applied, without doubting. It cannot be a question of degree, it is one of power or right.

There is no statistical or economical proposition better established, nor one to which a more general assent is given by reading and intelligent minds, than this, that the use of intoxicating liquors as a drink, is the cause of more want, pauperism, suffering, crime, and public expense, than any other cause—and perhaps it should be said, than ALL other causes combined. Even those who are opposed to restriction, oftentimes admit this truth. Every state applies the most stringent legal power, to lotteries, gambling, keeping gambling houses and implements, and to debauchery and obscenity, and no one questions the right and the justness of it; and yet how small is the weight of woe produced by all these united, when compared with that which is created by the use of intoxicating drinks alone. If by any process of reasoning, the state or the country is bound to support the pauper, to maintain a judicial system, in order to protect the community from crime, and to confine and maintain the criminal, then how is it possible to say, that she cannot look to the causes and sources of poverty and crime, and cut them

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off, or dry them up. But the right of these, our civil communities, to protect themselves against intoxicating drinks, is denied, and for this there are two processes of reasoning. The one is, that the liquors are property, and that the right to make and the right to sell, are inherent in, or incident to, the right of property. The other is, that the laws of the United States permit the importation; the right to import, carries the right to sell, at least in original packages; the right to sell in bulk, implies the right to buy, and the right to break bulk and sell by retail, follows. If this reasoning and this result are correct, then, indeed, are the states helpless. They have not one of the most necessary attributes of sovereignty, and even of individual right—that of self-protection; and state sovereignty is a fancy. Then, neither state or United States, can exercise this power, which is always admitted to belong to every independent community.

But the argument in the case at bar, stands thus: This is a limited, a constitutional government, and although the people may, yet the legislature, under the constitution, does not possess the power here claimed. We proceed to consider this question, keeping as near as possible to the beaten paths. Let us see what doctrines have been held in some cases, which may serve both as an answer to objections, and as a basis for our own reasoning.

In the case of *Fisher v. McGirr*, and the other cases (1 Gray, 1), C. J. SHAW says: "We have no doubt that it is competent for the legislature, to declare the possession of certain articles of property, either absolutely, or when held in particular places, and under particular circumstances, to be unlawful, because they would be injurious, dangerous, or noxious; and by due process of law, by proceedings *in rem*, to provide both for the abatement of the nuisance, and the punishment of the offender, by the seizure and confiscation of the property, and by the removal, sale, or destruction of the noxious articles. Therefore, as well to abate the nuisance, as to punish the offending or careless owner, the property may be justly declared forfeited, and either sold for the public benefit, or destroyed, as the circumstances of the case

may require, and the wisdom of the legislature direct. Besides, the actual seizure of the property intended to be offensively used, may be effected, where it would not be practicable to detect and punish the offender personally."

This able judge then states the question to be, "whether the measures directed and authorized by the statute in question (the Massachusetts Act), are so far inconsistent with the principles of justice, and the established maxims of jurisprudence, intended for the security of public and private rights, or so repugnant to the declaration of rights and the constitution, that it was not within the power of the legislature to give them the force of law, and that they must be held unconstitutional and void;" and that court were all of opinion that they were. These cases are referred to at this time, on account of the above views, and because these views are all that are required for such a law to stand upon; and are thus unequivocally set forth by that court, in cases which are cited, and relied upon, apparently with confidence, as conclusive against the act before us. The points upon which those cases were decided, and the differences between the Massachusetts and Iowa acts, will be noticed hereafter.

There have been some cases determined in the Supreme Court of the United States, also, upon laws enacted upon this same subject, which command our attention. We are not unmindful of the distinction, which has been so urgently pressed in relation to them, that they determine the rights of the states only, under the constitution and laws of the United States, but do not touch upon their powers under their own constitutions. This is true. Yet in those cases, are thoughts and reasoning upon the powers of the states in relation to these subjects, which, coming from that tribunal, are entitled to our deepest respect and gravest consideration. And it would be puerile to pretend not to see nor regard, the *reasoning* of that branch, even in cases where they are not to be cited as authority. As we quote commentators and elementary writers, so, *a fortiori*, would we resort to the fountains from which the elementary writers themselves, draw.

In the case of *New York v. Miln*, 11 Pet. 102, the Supreme Court say, that "it is not only the right, but the bounden and solemn duty of a state, to advance the happiness, the safety, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated; that all those powers which relate to merely municipal legislation, or what may, perhaps, be more properly called internal police, are not thus surrendered or restrained; and that consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive."

The considerations and reasoning in the cases of *Thurlow v. The State of Massachusetts*; *Fletcher v. The State of Rhode Island*; and *Pierce v. The State of New Hampshire*, 5 How. 504, are very important in their bearings upon the present law of Iowa. The Massachusetts law prohibits a sale of liquors without license, in a quantity less than twenty-eight gallons, which was a quantity greater than the law of the United States permitted to be imported in kegs. The Rhode Island law forbade a sale without license, in a quantity less than ten gallons, which was a quantity greater than the law of the United States permitted to be imported in bottles. The New Hampshire law forbade a sale in *any quantity*, without license. Neither of the cases was against an importer. The first two cases, related to foreign liquors imported. The New Hampshire case, related to liquor of domestic production, transported coastwise from one state to another, viz: from Massachusetts to New Hampshire. The objections to these laws were based upon those provisions of the constitution (art. 1, § 8, cl. 3, and § 10), which prohibit a state laying imports or duties upon importations, and giving to Congress the power to regulate commerce with foreign nations and among the states. The constitutionality of each of these laws, was maintained. But such was the importance of the cases, and such the difference of the train of reasons by which the Supreme Judges arrived at their conclusions,

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severally, that they nearly all gave their views, in one or more separate opinions. And in these, are views and reasons which help us on to a conclusion, on the various points made in the case at bar.

Chief Justice TANEY says (5 How. 577): "These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a state is bound to receive, and to permit the sale by the importer, of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable, to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And, if any state deems the retail and internal traffic in ardent spirits, injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States, to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper."

Mr. Justice McLEAN says: "The acknowledged police power of a state, extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city, may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded; and in extreme cases, it may be thrown into the sea. This comes in direct conflict with the regulation of commerce; and yet no one doubts the local power. It is a power of self preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity. He may resist that which does him harm, whether he be assailed by an assassin or approached by poison. And it is the settled construction of every regulation of commerce, that, under the sanction of its general laws, no person can introduce into a community, malignant diseases, nor anything which contaminates its morals, or endangers its safety. And this is an acknowledged principle,

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applicable to all general regulations. Individuals, in the enjoyment of their own rights, must be careful not to injure the rights of others." "The police power of a state, and the foreign commercial power of Congress, must stand together. Neither of them can be so exercised, as materially to affect the other. The sources and objects of these powers are exclusive, distinct, and independent, and are essential to both governments. The one operates upon our foreign intercourse, the other upon the internal concerns of a state. The former ceases, when the foreign product becomes commingled with the other property of the state. At this point, the local law attaches and regulates it, as it does other property. A state cannot, with a view to encourage its local manufactures, prohibit the use of foreign articles, nor impose such a regulation as shall in effect be a prohibition. But it may tax such property as it taxes other and similar articles in the state, either specifically, or in the form of a license to sell. A license may be required to sell foreign articles, when those of a domestic manufacture are sold without one. And if the foreign article be injurious to the health or morals of the community, a state may, in the exercise of that great conservative power which lies at the foundation of its prosperity, prohibit the sale of it. No one doubts this in relation to infected goods or licentious publications. Such a regulation must be made in good faith, and have for its sole object the preservation of the health or morals of society." "When, in the appropriate exercise of these federal and state powers, contingently and incidentally, their lines of action run into each other, *if the state power be necessary to the preservation of the morals, health, or safety of the community, it must be maintained.* But this exigency is not to be founded on any notions of commercial policy, or sustained by a course of reasoning about that which may be supposed to affect, in some degree, the public welfare. The import must be of such a character as to produce, by its admission or use, a great physical or moral evil. Any diminution of the revenue arising from this exercise of local power, would be more than repaid by the beneficial result.

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By preserving, as far as possible, the health, the safety, and the moral energies of society, its prosperity is advanced."

Justice CATRON, who may be considered as the least favorable in his reasoning, to the general views expressed above, in the same cases, says: "I admit as inevitable, that if the state has the power of restraint by licenses, to any extent, she has the discretionary power to judge of its limit, and may go to the length of prohibiting sales altogether, if such be her policy; and that if this court cannot interfere in the case before us, so neither could we interfere in the extreme case of *entire exclusion*, except to protect imports belonging to foreign commerce, as already defined." And he held that the states *had* the power of restraint by licenses, and, consequently, of *prohibition*, until Congress should pass some act regulating commerce between the states. These remarks were made in relation to the New Hampshire case, the law of which state forbade sales *at all*, without a license, including the importer in its terms; but in which case, the judge considered the liquors as standing upon the same ground as domestic liquors.

Mr. Justice DANIEL gives a greater latitude to the rights of the states, than the other members of that eminent court, and dissents from some restraints put upon the states, by the court, in the case of *Brown v. Maryland*, 12 Wheat. 419. In relation to the cases before that court, he says: "Every power delegated to the federal government, must be expounded in coincidence with the possession by the states of every power and right necessary for their existence and preservation." "The power to regulate this commerce (foreign), may properly comprise the times and places at which, the modes and vehicles in which, and the conditions upon which, it may *as a foreign commerce*, be carried on; but precisely at that point of its existence that it is changed from foreign commerce, at that point this power of regulation in the federal government must cease, the subject for the action of this power being gone." "But they (subjects of foreign commerce) must be continuing, and still, in reality, *subjects to foreign commerce*, and such they can no longer

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be, after that commerce with regard to them has terminated, and they are completely vested as property in a citizen of a state, whether he be the *first, second, or third* proprietor; if this were otherwise, then by the same reasoning, they would remain imports, or subjects of foreign commerce, *through every possible transmission of title*, because they had been once imported." "It cannot be correctly maintained, that state laws which may remotely or incidentally affect foreign commerce, are, on that account, to be deemed void. To render them so, they must be essentially and directly in conflict with some other power clearly vested in Congress by the constitution; and, I would add, with some regulation actually established by Congress, in virtue of that power. In the case of *Brown v. The State of Maryland*, 12 Wheat. 419, it is said by the court, that liberty to import, implies unqualified liberty to sell at the place of importation. In the argument of this case, the proposition just mentioned does not, in all its amplitude, seem broad enough for counsel, who have contended that *liberty to import, implies*, on the part of the states, *a duty to encourage*, if not to *enforce*, the consumption of foreign merchandise, arising, it is affirmed, from a farther duty incumbent on the states, to regard, *a priori*, the acts of the federal government as wisest and best, and, therefore, imposing an obligation on the states for co-operation with them. These very exacting propositions, it is believed, can hardly be vindicated, either by the legitimate meaning of words, or any correct theory of the constitutional powers of Congress." "When importations may have been made with the direct view to sell, it does not follow by necessary induction, that permission for the former to import, implies permission for the latter to sell, nor the power of granting the former, the power of confining the latter; much less, that it implies the power or the obligation on the part of the government to command or insure a sale."

It was upon this point of the implied right of the importer to sell, that Justice DANIEL differed from the court. In relation to the argument, that the importer pays a duty

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to the government, for the permission to introduce and vend his merchandise, he says: "In truth, no such right as the one supposed, is purchased by the importer, and no injury, in any accurate sense, is inflicted on him by denying to him the power demanded. He has, doubtless, in view the profits resulting from the sale of his commodities, but he has not purchased, and cannot purchase, from the government, that which it could not insure to him, a sale, independently of the laws and polity of the states. He has, under the legitimate power of the federal government to regulate foreign commerce, purchased the right to import or introduce his merchandise—the right to come in with it in quest of a market, and nothing beyond this. The habits, the tastes, the necessities, the health, the morals, and the safety of society form the true foundation of his calculations, or of any power or right which may be conceded to him for the sale of his merchandise, and not any supposed right in the federal government, in contravention of all these, to enforce such sale." "These stipulations (in treaties) no more signify that commodities shall be circulated and used free of all internal regulation, than they convey a positive mandate for their being purchased and consumed, eaten and drank, *volens volens*, or at all events. Every state, that is in any sense sovereign and independent, possesses, and must possess, the inherent power of controlling property held and owned within its jurisdiction, and in virtue and under the protection of its own laws, whether that control be exercised in taxing it, or in determining its tenure, or in directing the manner of its transmission; and this, too, irrespective of the quantities in which it is held or transferred, or the sources whence it may have been derived."

In the same cases, Mr. Judge WOODBURY says: "It is not enough to fancy some remote or indirect repugnance to acts of Congress—a 'potential inconvenience'—in order to annul the laws of sovereign states, and overturn the deliberate decisions of state tribunals. There must be an actual collision, a direct inconsistency, and that deprecated case of 'clashing sovereignties,' in order to demand the judicial in-

terference of this court to reconcile them. *McCulloch v. Maryland*, 4 Wheat. 487; 1 Sto. Com. on Const. 482." "And what power or measure of the general government, would a *prohibition of sales* within a state conflict with, if it consisted merely in regulations of the police or internal commerce of the state itself." "The idea, too, that a *prohibition to sell* would be tantamount to a *prohibition to import*, does not seem to me either logical or founded in fact. For, even under a prohibition to sell, a person could import, as he often does, for his own consumption and that of his family and plantations; and also of revenue which would otherwise accrue from foreign imports, or from those of that particular article." This able judge further says: "But I go farther on this point, than some of the court, and wish to meet the case in point, and in its worst bearings. If, as in the view of some, these license laws were really in the nature of partial or *entire prohibition to sell certain articles within the limits of a state*, as being dangerous to public health and morals, or were virtual taxes on them as state property, in a fair ratio with ether taxation, *it does not seem to me that their conflict with the constitution would, by any means, be clear*. Taking for granted, till the contrary appears, that the real design in passing them for such purposes, is the avowed one, and especially while their provisions are suited to effect the professed object, and nothing beyond that, and do not apply to persons or things except where within the limits of state territory, they would appear *entirely defensible as a matter of right, though prohibiting sales*." "Whether such laws of the states as to license, are to be classed as police measures, or as regulations of their internal commerce, or as taxation merely, imposed on local property and local business, and are to be justified by all of them together, is of little consequence, if they are laws which, from their nature and object, must belong to all sovereign states. Call them by whatever name, if they are necessary to the well-being and independence of all communities, they remain among the reserved rights of the states, no express grant of them to the general government having been either properly or ap-

parently embraced in the constitution. So, whether they conflict or not, indirectly and slightly, with some regulations of foreign commerce, after the subject matter of that commerce touches the soil or waters within the limits of a state, is not perhaps very material, if they do not really relate to that commerce, nor any other topic within the jurisdiction of the general government." "As a general rule, the power of a state over all matters not granted away, must be as full in the bays, ports, and harbors within her territory, *intra fauces terræ*, as on her wharves or shores, or interior soil. And there can be little check on such legislation, beyond the discretion of each state, if we consider the great conservative, reserved powers of the states, in their quarantine or health systems, in the regulation of their internal commerce, in their authority over taxation, and, in short, every local measure necessary to protect themselves against persons or things dangerous to their peace or their morals." "It is the undoubted and reserved power of every state here, as a political body, to decide, independent of any provisions made by Congress, though subject not to conflict with any of them when rightful, who shall compose its population, who become its residents, who its citizens, who enjoy the privileges of its laws, and be entitled to their protection and favor, *and what kind of property and business it will tolerate and protect*. And no one government, or its agents or navigators, *possesses any right to make another state, against its consent, a penitentiary or hospital, or poor-house farm, for its wretched outcasts, or a receptacle for its poisons to health, and instruments of gambling and debauchery.*"

Mr. Justice GRIER says: "Without attempting to define what are the peculiar subjects or limits of this (the state) power, it may safely be affirmed, that every law for the restraint and punishment of crime, for the *preservation of the public peace, health, and morals*, must come within this category,—that is, of the authority being complete, unqualified, and exclusive. If the right to control these subjects be 'complete,' unqualified, and exclusive in the state legislature, no regulations of secondary importance, can supersede or re-

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strain their operations, on any ground of prerogative or supremacy. The exigencies of the social compact *require, that such laws be executed before and above all others.*" "It is not necessary for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism, and crime, which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the states, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose, are within the scope of that authority. There is no conflict of power or of legislation, as between the states and the United States; each is acting within its sphere, and for the public good, and if a loss of revenue should accrue to the United States, from a diminished consumption of ardent spirits, she will be the gainer a thousand fold in the health, wealth, and happiness, of the people."

Thus are given quotations from six of the nine judges constituting the supreme bench of the United States, and from each one who prepared an opinion. If any apology is needed for the amplitude of these quotations, let it be found in the importance of the subject, and in the general want of correct information in respect to the views of that court upon these subjects. Obtaining right notions of those views, we are enlightened upon the questions before us, and upon such similar ones as may arise. It is cheering to find, in these opinions, that the reasoning of some *courts* even, receives no countenance from that bench; and that the rights conceded to the importer, are not considered as carrying with them such a train of consequences as has sometimes been held—consequences which take from a state the right of self-protection.

Let us now see what that court has judicially holden, which bears upon the questions before us. The case of *Brown v. The State of Maryland*, was brought against the importer of dry goods. The state law required such importer to take out and pay for a license to sell. It was held, that the importer had a right to sell his imported goods in

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their original packages, without further tax than the duties required by the law of Congress, and that the state law imposing a tax for a license, was invalid. In *Gibbons v. Ogden*, 9 Wheat. 1, it was held, that the power to regulate commerce between the states, given to Congress by the constitution, was not *exclusive* in Congress, until exercised—nor, perhaps, until there was a collision between regulations made by Congress and by a state. And the same view was taken in *Wilson v. Blackbird Creek Marsh Company*, 2 Pet. 251. In the above cases of *Fletcher v. Rhode Island*, and *Thurlow v. Massachusetts*, 5 How. 504, it was held, that laws requiring a license to be obtained before selling liquors (including foreign and imported) in less quantities than ten and twenty-eight gallons, were constitutional and valid. In *Pierce v. New Hampshire*, 5 How. 504, it was held, that a law requiring a license to be obtained, (which license might be refused,) before the sale of liquors in *any quantity*, was valid and constitutional, when applied to liquors imported from another of these states, Congress having made no regulations in relation to commerce between the states. In the above three license cases, all of the six judges who delivered opinions, recognize the authority of a state to *prohibit* the sale of spirits within its borders, as a police or internal regulation—excepting only the importer of foreign spirits, selling in the original quantities imported. There has been nothing decided, then, by the Supreme Court of the United States, with which the prohibitory law of Iowa conflicts. That act prohibits the sale of intoxicating liquors in any quantity; but it saves the case of the importer. The objection, therefore, that this act is in conflict with the constitution or laws of the United States, is not well taken.

The second class of objections urged against the act under consideration, is, that in several of its provisions, or omissions to make provisions, it is a violation of some requirements of the constitution of the state, or of its spirit and meaning. As two of the objections in this class, are of a nature quite different from the others, it will be convenient to consider them by themselves. These are:

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First. "That the statute under which the proceedings are commenced, is not a valid and existing law of Iowa, nor can be; for that the legislature of the state in the making thereof, delegated the power of its taking effect, to the contingency of a vote of the people in its favor."

Second. "That no publication of said law has been had, as the constitution of the state requires."

We will first consider the question relating to the submission of an act to a vote of the people. And on this subject, we entertain no doubts. The General Assembly cannot legally submit to the people, the proposition whether an act should become a law or not; and the people have no power, in their primary or individual capacity, to make laws. They do this by representatives. There is no doubt of the authority of the legislature, to pass an act to take effect upon a contingency. But what is a contingency, in this sense and connection? It is some event independent of the will of the law-making power, as exercised in making the law, or some event over which the legislature has not control. For instance, the embargo laws and their cessation, were made to depend upon the action of foreign powers in relation to certain decrees. The will of the law maker is not a contingency in relation to himself. It may be such in relation to another and external power, but to call it so in relation to himself, is an abuse of language. Now, if the people are to say whether or not an act shall become a law, they become, or are put in the place of, the law maker. And here is the constitutional objection. Their will is not a *contingency* upon which certain things are, or are not, to be done *under the law*, but it becomes the determining power *whether such shall be the law* or not. This makes them the "legislative authority" which, by the constitution, is vested in the Senate and House of Representatives, and not in the people.

It cannot be considered necessary to argue concerning the submission of acts of incorporation to the acceptance of the incorporators. These are private matters, and not a part of the public law of the land. It is a question of private interest only, whether certain persons shall become a corpora-

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tion; and, in the case of a strictly private one, probably the legislature could not make them such against their assent. And in the case of municipal corporations, they are, in the legal sense, private; and so they are in a common sense, to all practical intents. It is a question for the local community alone to determine, whether they will be incorporated, or whether they will be so as a town or city. This distinction is made practically, always and everywhere, whether it be founded in strict logic or not. The constitution prescribes the manner in which bills shall become laws, and acts or laws can be enacted in no other way. A certain body, or department, is created for this purpose, and no other has the smallest authority in that respect. Article 3d of the constitution is, in part, as follows: "The powers of the government of Iowa, shall be divided into three separate departments—the legislative, the executive, and the judicial. The legislative authority of this state, shall be vested in a Senate and House of Representatives, which shall be designated the General Assembly of the state of Iowa; and the style of their laws shall be, 'Be it enacted by the General Assembly of the state of Iowa.'" How is a law enacted? Section 16th of the same article, directs that "Bills may originate in either house, except, &c.; and every bill having passed both houses, shall be signed by the speaker and president of their respective houses." And section 17 provides that "Every bill which shall have passed the General Assembly, shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it; but if not, he shall return it with his objections," &c. Then follow directions as to how it shall become a law, notwithstanding the governor's objections. It will be observed that there are, under the constitution, but three departments of the government; that the legislative department consists of the Senate and House of Representatives, and the people do not constitute a portion of it; and that laws are enacted "*by the General Assembly.*" This is the mode provided by the constitution, for making laws. A bill becomes an act or a law in the above manner, or it never becomes such. A vote

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of the people cannot make it become a law, nor can it prevent it becoming one. After a bill has thus passed the two houses, and received the approval of the governor, and thus become a law by the constitution, how can a vote of the people affect it? As well might this court, submit the decision of these causes to a vote of the people of the state, or of a judicial district; or the governor his pardoning power. If there is any efficacy in a vote of the people in *passing* a law, then of course, it can be *repealed* only by a vote.

What effect, then, had the vote of the people? None at all, in a legal sense or manner. The constitution made it an act of the General Assembly, when it had passed the two houses, and received the proper signatures. But it is argued, that the eighteenth section, submitting the act to a vote, is part of the act; and so becomes law with the rest. The answer to this is, that if the General Assembly has no authority to submit such a question, then such a provision is void, and it will follow that either the whole act, or the section containing the objectionable matter, is null and void. The following are authorities on both sides of the question, of submitting acts to a vote of the people. The following hold it constitutional: *The State of Vermont v. Parkes*, 3 Liv. Law Mag. 13; *Johnson v. Rich*, 9 Barb. 680. The following hold it unconstitutional: *Thorne v. Cramer*, 15 Barb. 112; *Bradley v. Baxter*, 15 Barb. 122; 1 Am. Law Reg. 658; *Barto v. Himrod*, 4 Seld. 483, 4 Harringt. (Del.) 479; *The People v. Collins*, 2 Am. Law Reg. 591; *Commonwealth v. Williams*, 11 Penn. 61; *Parker v. Commonwealth*, 6 Barr. 507.

This leads us to the next step; which is, whether the whole act, or the eighteenth section only, is invalid. It is assumed, for the present, that the matter was submitted to the people in the largest and broadest sense. This is unconstitutional and void. But an act void in part, is not necessarily void for the whole. If sufficient remains to effect its object, without the aid of the invalid portion, the latter only shall be rejected, and the former shall stand. This doctrine is clearly maintained in the Massachusetts cases. *Fisher v.*

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McGirr and other cases, 1 Gray, 1; 6 How. (Miss.) 625; *State v. Cox*, 3 Eng. (Ark.) 437; *Commonwealth v. Kimball*, 24 Pick. 361; *Morris v. Boston*, 4 Met. 288; *Clark v. Ellis*, 2 Blackford, 10. Now, the prohibitory act of Iowa is a complete act in all its parts, without the eighteenth section, submitting it to the people. No part depends, for its efficacy or practicability, on that section. It can be carried into effect as well without it, as with it. That section relates to nothing but the vote, the returns, publication of the result, and like matters. Testing this act, then, by the same rules which are applied to others, we see no reason why the whole act should be declared unconstitutional and void. It was not the vote of the people which was unconstitutional, but it was the submission to the people; and that part of the act was and is invalid, if it submitted the question whether it should be the law or not; and the vote was, to a legal intent, nugatory. It effected nothing. The act would have been law, had the vote been against it. Why the courts of some states have held an act submitted to the people to be void, rather than the mere act of submission—as in the case of the New York school law—does not clearly appear. Under our constitution and laws, there seems to be no difficulty, as will be shown in the next step of our inquiry.

Thus far, we have spoken in gross, and without discrimination, of the submission to a vote. But, if we are not correct in viewing the submission alone, as the invalid part of the act—in other words, if a submission to a vote of the people, renders the whole act void, then it becomes necessary to be more exact, and to see what was submitted, and in what terms or manner. Let us assume, for this part of the argument, that the whole act is rendered unconstitutional, if it was submitted to the vote, upon the condition that if the vote was in its favor, it shall be a law, and if the vote was against it, then it should not become a law. In the case of the New York free school law, section 10 provided, that "The electors shall determine by ballot, at the annual election, to be held in November next, whether this act shall or shall not become a law." And section 14 was, that if a ma-

majority of the votes should be against it, then "this act shall be null and void;" and if they should be in its favor, "*then this act should become a law, and take effect.*" In this case it was distinctly put to a vote of the people, whether the act *should become a law or not.* And if the legislature could, by any possibility, put from itself the determination of this question, it did so in that case.

But it is apprehended that the Iowa act, stands quite differently. The eighteenth, and last section is, in substance, as follows, certain parts being quoted literally: "At the April election, to be holden on the first Monday in April, A. D. 1855, the question of prohibiting the sale and manufacture of intoxicating liquor, shall be submitted to the legal voters of the state;" then follow provisions concerning the election and the returns; the ballot is to be "For the Prohibitory Liquor Law," or "Against the Prohibitory Liquor Law;" an official statement of the result of the vote is to be made and published; "and if it shall appear from such official statement, that a majority of the votes cast as aforesaid upon said question of prohibition, shall be for the prohibitory liquor law, then this act shall take effect on the first day of July, A. D. 1855;" but providing that those portions of the act which relate to the election directed in this section, should take effect from and after publication in the newspapers therein named. The act is signed by the president of the Senate and the speaker of the House, and approved by the governor. Now it is manifest, that here is no distinct submission to the people, of the question "whether this act shall or shall not become a law," as in the New York case. It is not provided that if the vote be against it, it shall not become a law, or that it shall not take effect. The provision that if the vote be for it, it shall take effect on the first day of July, affords some little weight of argument against this view; but it is not possible to give to the implication contained in them, a weight sufficient to override the argument drawn from the provisions of the constitution relative to the passage of laws, and from the want of power in the legislature. And the more especially is this true, when a fair and

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constitutional object for these provisions can be found, and a consistent meaning and proper effect, can be given to the provisions of the act, so as to give effect to the whole.

For some time after the establishment of the state government, it was doubted whether the judiciary possessed authority to declare and hold an act of the legislature unconstitutional and void, and the exercise of the power was declined by some courts. And now, although the power is universally admitted, its exercise is considered of the most delicate and responsible nature, and is not resorted to, unless the case be clear, decisive, and unavoidable. It is the duty of the court to give an act such a construction, if possible, as will maintain it. *Rice v. Foster*, 4 Harring. (Del.) 479; *Fisher v. McGirr, &c.*, 1 Gray, 1; *Maize v. State*, 4 Ind. 342; 20 Ohio, Append. 1; *Commonwealth v. Williams*, 11 Penn. 61; *State v. Cooper*, 5 Blackford, 258; 2 Pet. 522; *Ogden v. Saunders*, 12 Wheat. 270; 19 Johns. 58, 1 Cow. 550; *Calder v. Bull*, 3 Dall. 386; 4 Dall. 309; *Fletcher v. Peck*, 6 Cran. 87. Every lawyer knows that it is a common argument, often resorted to, against some construction of an act, that that would be giving it an unlawful, an unconstitutional effect, and therefore, the legislature did not so intend it. And this is a legitimate argument, and one which not unfrequently prevails. Certainly some more words, and negative words, are wanting in this section, to compel a court to give it such a construction as will nullify the whole, or even the section alone.

But what meaning can be given it, which will leave it consistent and valid? Suppose the legislature, having enacted the law, designed to ascertain the moral sentiment of the people of the state on the subject of "prohibition," in order, first, that if the community should be in favor of that policy, the law might have the aid of the power of that public moral sentiment; and secondly, that, if the public voice should be against the policy, this might be certainly ascertained, and the law repealed. This would be entirely consistent with the constitution, and perfectly rational; for not only does our government peculiarly stand upon public

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sentiment, but it is also well understood, that a law of this nature, especially, requires the aid of the public moral sense, as well as its legal authority, for its enforcement. Had this been the intent of the law-making power, it could not have used language better adapted to it, with the slight exception above alluded to; nor, indeed, could *omission* of language have been more appropriate. And what the act does *not* say, is important, as well as what it does say. Now, when the language and provisions of an act are consistent with a lawful end, and this is its apparent meaning, whilst another construction would give it an unlawful effect, it is the duty of a court to take that view which is lawful and consistent. In view of the rules and considerations above suggested, which are the ordinary ones applied by courts to all acts of the legislature, we are constrained to hold:

1. That the whole act is not rendered invalid, even though the submission to a vote should be held unconstitutional. //

2. That the vote called for in the eighteenth section of this act, was not upon the question, whether it should become a law or not, and therefore there is no sufficient objection, even to that section. //

Another objection of a constitutional character arises under Art. 1, § 26, which is: Every law shall embrace but one object, which shall be expressed in the title. It is urged, that this act contains both more than one object, and objects not expressed in the title. The title is, "an act for the suppression of intemperance." It would require too much space to pass in detail, through the argument of the counsel in the case against Santo, on this question. He carries it farther than we are inclined to follow him. In the course of it, he substitutes the word *subject* for *object* (between which, it is apprehended, that there may be a distinction), and applies both of them to each *step* which may be taken toward the attainment of the *object* of the enactment. According to this argument, the provisions for the punishment of drunkenness, prohibiting the sale, declaring certain things nuisances, the appointment of agents, &c.,—each distinct idea or *step*—is severally a new *object*. We cannot concur in the objection. The act is en-

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tirely free from it. Were the argument valid, an act could hardly extend beyond one period—certainly not beyond one session. Each step toward the main object, must be provided for by a separate enactment. Half the acts in the statute books, embrace several ideas or steps in the progress of their provisions toward the attainment of the main object. The object may be a broader or narrower one, but if it be a *bona fide* object for legislative attainment, and the several steps embraced in it, are fairly conducive to that end or object, it is still a unit. Under what other view, could a school or revenue act be framed or upheld. Does not each of these present a unity of object? Must they be divided into as many separate acts, as there are provisions to carry out the main end? Such is not the design of the constitution. This act presents a fair unity of object. See the case of *The State ex rel. Weir v. County Judge of Davis County*, post.

The next class of objections presented, arises from the following provisions of the constitution :

ART. 1.—SEC. 1. That all men have the right of acquiring and protecting property.

SEC. 8. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the papers and things to be seized.

SEC. 10. That in all criminal prosecutions, the accused shall have a right to be informed of the accusation against him, and to be confronted with the witnesses against him.

SEC. 18. Private property shall not be taken for public use, without just compensation.

ART. 3.—SEC. 27. That no law of a public nature shall take effect, until the same shall be published and circulated in the several counties, by authority.

Let us keep in mind, what has been before said concerning the duty of a court to sustain an act of the legislative department of the government, if it can be done consistently, and to give it such a construction as will uphold it, if this

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can be done fairly, rather than one which will overthrow it. We have said that we should not incline to theorize. Neither will we quote the merely theoretic writers. For a sufficient expression upon the rights of individuals, and of the state governments, reference is made to the quotations heretofore made from the opinions of the able men comprising the highest judicial tribunal in our country, and upon these we shall, for the present, rest. We will next endeavor to state, as connectedly as possible, and to notice, the objections arising under each of the foregoing provisions of the constitution. And, as there will be occasion probably to refer to the constitutions and laws of the United States, and of Indiana, Michigan, Wisconsin, Missouri, and Kentucky, it is here stated, once for all, to save repetition, that each of them has provisions like those above cited from that of Iowa, and either in the same terms (which is generally so), or in terms so similar, that no distinction need be taken—excepting that which relates to the publication of laws.

First. It is objected that there has been no publication of this act, as is required by the constitution. This objection is not explained and applied, so as to make it intelligible. Art. 3, § 27, provides only that the law shall not take effect, until published and circulated. It gives no detailed directions. The Code, § 22, makes general provision on this subject, and directs that acts of a public nature shall take effect, on the first day of July following the session : and that every such act shall be presumed to have taken effect at that time, unless the contrary appear, as provided in §§ 23 and 24. No facts are shown in the case, to make a question. We find the act in the volume of session laws, which was published before the first day of July, 1855, and believe it took effect on that day, by virtue of the above general provisions. But here it is objected, that a part of the act, that is, that part relating to the vote, is made, by the act itself, to take effect on the publication of the law in certain newspapers. We see no valid objection to this. By Art. 3, § 27, of the constitution, if the General Assembly deem a law of immediate importance, they may provide that it take effect by publica-

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tion in newspapers. And it is no uncommon thing for an act to be made to take effect, in part at one time, and in part at another. This is generally true of our acts incorporating towns and cities, in which there is a submission to the acceptance of the citizens.

Second. We give our attention to the exceptions taken under Art. 1, sections 1, 8, 10, 18, above cited. They are thus enumerated :

1. No particular description of the place to be searched, or the property to be seized, is required by the act.

2. The charge is not required to be distinctly and fully made against the defendant.

3. The prosecution is a criminal one, and it is not made necessary to inform the defendant, nor need he be confronted with the witnesses.

4. It authorizes a destruction of the property, without notifying the defendant.

5. It authorizes a forfeiture and destruction of private property, without trial, and as a penalty for crime, which need not be proved.

6. It presumes the guilt of the accused.

7. It authorizes the abatement and destruction of property, real and personal, upon the fact of finding the liquor, without other proof.

8. It gives justices of the peace jurisdiction of an unlimited amount of property.

These questions, especially, we desire to try, and to test this law, by the laws here and elsewhere on other subjects.

1. As to the description in the search warrant. The act requires the place, person and property, to be described "as particularly as may be," and the argument is raised, that if the complainant describe them as particularly as he can, or as he knows how, this shall be held sufficient, however loose and indefinite it may be. This is giving a false and unnecessary sense to these words. They seem to us to convey the idea of the *greatest* degree of certainty. The constitutions of Missouri and Kentucky have the same language as our act—"describing the person, place or thing, *as nearly as may*

be." Was this intended to loosen the particularity of the description required? On the contrary, it is giving additional emphasis to the word "particularly."

2. As to the manner of charging the offence. The objectors do not specify any defects. The act requires the charge to be made in like manner as is required in relation to other offences. It gives no especial directions, but, like other laws, describes the offence, and requires an information, and this must conform to the usual rules of law.

3. On informing the defendant, and confronting him with the witnesses. It is true that the act does not require that the defendant be arrested, nor is this necessary; but it requires a notice to him, as effectual, in substance, as when he is sued for any amount of indebtedness, and on which judgment may be rendered for a thousand or ten thousand dollars. And the act requires, or rather allows, him to be confronted with the witnesses, in the same manner that other provisions of law do. There is no distinction between this act and others, on these questions generally. The objections are drawn from another source, which will be noticed presently.

4. That the act authorizes the destruction of the property, without notifying the defendant. This objection is not founded in fact, and if it were, it is not clear that it would be valid.

5. That the act authorizes a forfeiture and destruction of private property, without trial, and as a penalty for crime which need not be proved; and,

6. It presumes the guilt of the accused.

The first clause of this objection is utterly without foundation. The act requires a trial as much, and in the same manner, as any other act does. The objection relating to the presumption of guilt, arises on the seventh section of the act, which is, in substance, "that no person shall own or keep intoxicating liquor, with intent to sell the same in this state; and the proof of finding the liquor named, in the possession of the accused, in any place, except his private dwelling house, or its dependencies, shall be received and acted

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upon, as presumptive evidence that such liquor was kept or held for sale, contrary to the provisions of this act." The charge that the act either presumes the guilt of the defendant, or inflicts a penalty for a crime, without proof, is not true, in fact. The objection intended, was probably, that the act presumes the guilt from certain facts, or from insufficient facts. The length of this opinion, already warns us, that we cannot enter fully into all the questions raised and suggested; and that we must not attempt to go at large, into that of the power of the legislature over the subject of evidence.

The act prohibits the sale of ardent spirits, and, consequently, forbids the keeping it, with intent to sell; and then it makes the keeping it in certain circumstances—or, if you please, in any *but* certain circumstances—presumptive evidence of keeping, with intent to sell. It does not forbid the use of it, nor the keeping it, but it cannot be kept free from legal suspicion, unless kept in one's dwelling-house or its dependencies. The dealer in gunpowder is often restricted to one place for keeping this portion of his property, and is forbidden, perhaps, to keep it within the town in which he lives, and transacts his business. The sale of spirits being prohibited, its possession is rendered a suspicious fact, unless it be so kept as to indicate an intent for private use. So, the possession of more than a certain number of counterfeit coins, or bank bills, is sometimes rendered presumptive evidence of an intent to utter. Illicit goods, found amongst a passenger's baggage, become strong presumptive evidence of an intent to evade the revenue laws. (1 U. S. St. at large, 662, § 40); and they are seized and forfeited. Goods entered under a false invoice, serve the same purpose, and are forfeited. Same, § 66. By the Rev. Stat. of Indiana, 968, the knowingly retaining in possession, dies, plates, &c., used in forging coin, or notes, is presumptive evidence of an intent to use them. So, by the same law, keeping gaming tools is punished upon the same ground. And instances of the like kind, from the laws of all the states, could be multiplied. We have seen that the legislative authority of the state, ex-

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tends to its internal commerce and police, and to the health and morals of the community; and under this, a sound discretion is the only limit which can be prescribed to laws regulating the uses or possession of suspicious, injurious, or dangerous property.

7. Of the jurisdiction conferred upon justices of the peace. The exception is a novel one. It is not, that the justice has jurisdiction of offences of too high a grade, for in this respect, this act comes within the general provision of the Code; but it is, that incidentally, he may obtain cognizance of property of an undefined amount. Such a criterion for the jurisdiction of a justice of the peace in criminal cases, as is intimated in this objection, is not known to the constitution or laws of this state, nor of any other, of which we have any knowledge. This objection, if valid, would lie to all the laws of this and the other states, relating to the seizure of gaming tables and implements, of instruments and tools for counterfeiting, of obscene books and prints, &c.

We have thus adverted briefly, to all the several legal matters embraced in the exceptions taken to this act, and coming within the range of constitutional provision. But it is felt that this range of quotations, is not entirely complete and satisfactory, being limited to the objections actually assigned in the cases. And as there are three cases before the court, and the arguments in some of them, go beyond the errors assigned, in their bearing and spirit, and aim to cover broader ground, we will not feel ourselves rigidly confined.

The objection is not, that the power of search and seizure, given by this act, is unreasonable, within the meaning of the constitution. The term "unreasonable" in the constitutions of the states, has allusion to what had been practiced before our revolution, and especially, to general search warrants, in which the person, place or thing was not described. It is believed that no search warrant is unreasonable, in the legal sense, when it is for a thing obnoxious to the law, and of a person and place, particularly described, and is issued on oath of probable cause. The laws of the United States in

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relation to commerce, go far beyond this act. 1 Stat. at large, 662. The officer is not required, generally, to have a warrant. A passenger's baggage is searched, and illicit goods are seized and forfeited. § 46. Goods removed from a wharf, &c., before they are weighed, gauged, measured, or whatever, are forfeited, and may be seized. § 51. Collectors, naval officers, &c., may board vessels within four leagues of the coast, and search them in "every part." §§ 54 and 99. Goods entered with a fraudulent invoice, are forfeited, and if the collector suspect it, he may seize them. § 66. The laws of the states generally, concerning the search of gaming houses, and the seizure of persons and implements; for the search and seizure of base coin, and counterfeiting tools, devices and implements; of lotteries and tickets, and of obscene books, prints and pictures; stand upon the same ground, and have no more legal virtue, than the warrant, search, and seizure required or permitted by this act; and if this must fall, by reason of any objection here urged, they must fall with it, so far as the principle is concerned. These have never been objected to, on constitutional grounds, although they have existed from the beginning of these governments. The supposed doubt has arisen, only on the present subject.

The same remarks extend to the objections based on the constitutional provisions concerning the right to acquire and protect property, and the other objections based on the idea of interference with private right, and on the destruction of property. All the laws above referred to, require the destruction of various kinds of property; they interfere with the individual's notions of the pursuit of happiness, with his supposed private rights, and his property. The legislative power is the supreme judge and guardian of the public health, safety, happiness and morals; and if the traffic in certain property, is held detrimental or dangerous to these, it may be prohibited, and such property illicitly held, kept or used, may be declared forfeited, and being forfeited, may be destroyed; and this is not taking private property for

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public use, in any sense which any one attaches to the constitution.

There is one other manner of viewing this act, which may afford some satisfaction. It cannot but be observed, by one who compares, that the most of the objections presented against the Iowa act are, or seem to be, drawn from objections made to the Massachusetts act, in the cases of *Fisher v. McGirr*, *Commonwealth v. Albro*, and *Herrick v. Smith*, 1 Gray, 1. And for this reason it is, perhaps, that some of them are not more pertinent. On account of the general similarity of that act to ours, and of the important bearing which the rulings of that court, in those cases, have, or seem to have, on the questions here made, it will be useful to compare that act, and the points decided upon it, with our own law. This will be done as briefly as possible:

1. The court, in those cases, says: It is nowhere provided, in direct terms, that keeping, or having liquor deposited for sale, shall be in itself unlawful, and render the property liable to confiscation, or subject the owner, agent or other depositary, to a penalty therefor. This position of the court, or this fact in relation to the act, has an important effect in the reasoning and views of the court, which is traceable throughout the opinion. The Iowa act, section 7, provides, that "no person shall own or keep, or be in any way concerned, engaged, or employed in owning or keeping, any intoxicating liquor, with intent to sell the same in this state (or to permit the same to be sold therein), in violation of the provisions of this act;" and for the first offence, he is to pay a fine of twenty dollars; for the second, fifty; and for the third, &c., one hundred dollars, and to be imprisoned. We start, then, clear of the effect of this objection on the act of the Iowa legislature.

2. The Massachusetts act did not limit the officer's authority for seizing, to any liquors described, by quantity, quality or mark, nor to those intended for sale, but he was to seize *any* found in the place described. This objection is obviated by our act. It requires the liquors to be "described as particular as may be," in both the complaint and warrant;

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and the officer is to be commanded to seize "the *said* liquor."

3. The other objections to the Massachusetts act, will be coupled together. It provides for the destruction of the property, and the punishment of the owner, without his being duly charged or summoned—without giving him a day in court—without providing for a trial—or for legal proof—and without giving him an opportunity to defend, and to meet the witnesses face to face. No one of these objections lies to the Iowa act. By this, if the proceeding is *in personam*, the party will be arrested and proceeded with, in the same manner as he would be for any other offence cognizable by a justice of the peace. If the proceeding is *in rem*, the party is to be notified, by a notice equal to that upon which a judgment for debt may be recovered against him. In relation to this objection, it is worthy of remark, that when goods are seized and libeled under the United States revenue laws, for a violation of them, it is not provided that the owner should be known, or named, or notified. Notice of the proceeding is given by advertisement and posting only, and the owner may appear and claim the property in the goods, and be let in to a defence, by giving bond to defend and pay the costs. Act 2 of Mar. 1799, § 89; 1 Stat. at large, 662, *et seq.* And as much as has been said in these cases, in relation to the presumption raised by the statute from certain facts, let us observe a provision in section 71, of the foregoing act of Congress. It is this: "In actions, suits, or informations to be brought when any seizure shall be made pursuant to this act, *if the property be claimed by any person*, in every such case the *onus probandi* shall be *on the claimant*," when probable cause has been shown in a complaint. This goes far beyond the act before us, and yet that law was made in a day when questions of personal right were tender ones. And the provisions of the constitution of the United States are, in these respects, like those of the constitution of this state, as well as of that of Massachusetts and other states. These laws of the United States have

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stood nearly sixty years; why have they not been overthrown?

The chapter of the Code relating to the sale of intoxicating liquors, has never been questioned in these respects, and yet in some of them, it is, perhaps, equally liable to objection, with either the Massachusetts or the recent Iowa act. By this latter, a day for trial is to be appointed, not less than five, nor more than fifteen days, after giving the notices; the complainants, or other witnesses, are to be summoned, and the trial is to proceed like other trials. It is true that *all* of the *minutiae* of the proceedings, are not detailed; nor are they generally, by the laws of this state, or of any state, where a new offence is created and made punishable. They are left to come under the general provisions of law in relation to such matters, and a detail of them is not necessary in every instance. They apply to all cases.

Whilst these Massachusetts cases have been relied upon as strong, perhaps conclusive, authority against the Iowa act; it is singularly true, that the Iowa act has especially and carefully guarded every one of those points on which the Supreme Court of Massachusetts decided against the validity of their act. So true is this, that the mind is led to the conclusion, that the draftsman of our act was acquainted with the other, and sought to avoid its difficulties. And it affords us great satisfaction, that in following our legal convictions in regard to the law of Iowa, we are not opposing any doctrine advanced by that able bench. We conclude, then, that none of the objections made to this law, on constitutional grounds, are valid, and there remains nothing for us to do, but to examine the objections to the proceedings in the particular cases.

In the case of *Santo and others v. The State*, in a motion to dismiss the prosecution, seventeen reasons, of a constitutional nature, are assigned. These are much divided and attenuated, so that it is difficult to take them up *seriatim*, but it is believed that the substantial thoughts involved in them, are embraced in the foregoing remarks. The other objections to the proceedings, contained in the assignment

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of errors, will be briefly noticed. The first error assigned, is in overruling the motion to dismiss the proceedings. This is understood to refer to the motion before the mayor, which contains the above seventeen reasons. Those of a different nature are the following:

First. That the mayor of the city of Keokuk, had no legal authority to entertain the cause. The charter of that city, approved December 13, 1848, section 23, and an act in amendment thereof, approved January 22, 1853, sections 12 and 13, are very distinct in conferring upon the mayor the jurisdiction of a justice of the peace, under the criminal laws of the state, and *make* him a justice, in substance, although they do not *call* him such in terms, as do the charters of some other towns. Should there be any constitutional objection to the above section in the amendatory act, it is not necessary to consider it now, as the original charter gives all the authority here required. The objection intended is, that the mayor is an executive officer, and that judicial authority is conferred upon him, in conflict with that provision of the constitution which says, that no person charged with the exercise of powers properly belonging to one of these departments—the executive, the legislative, or the judicial—shall exercise any function appertaining to either of the others. These “departments,” are the departments of the government of the state of Iowa. The mayor of the city of Keokuk, is not a part of the government of Iowa. He exercises none of the functions belonging to that department. Whatever executive offices he may perform, pertain to him only as an officer of that corporation. But we do not mean to say that he is an executive officer, in any proper sense. Similar provisions exist in the constitutions of all, or nearly all, the other states, and yet from time immemorial, similar powers have been conferred upon the mayors of cities. We are of opinion, that the objection is not well taken.

Second. The want of the mayor's seal on the warrant. The seal of the town is a “corporate seal” (see charter, § 1), and is not known to the general law of the land. It is not his

seal as a justice of the peace under the state law, and his court is not a court of record.

Third. It is objected that Mark P. Landon was a constable of Keokuk, and that the same person is one of the complainants. The Code, section 175, provides, that no sheriff, deputy sheriff, coroner or constable, shall appear in any court, as attorney or counsel for any party, nor make any writing or process to commence [a suit, or a proceeding,] or to be in any manner used in the same, and such writing or process made by any of them, shall be rejected. It is quite unnecessary to extend the construction of this section, so far as to prohibit peace officers from making complaint of the violation of the penal laws. This would be without the letter, and against the spirit, of the section, and destructive of half the object and utility of those officers.

The fourth objection is, That the information and warrant are void, inasmuch as neither the place to be searched, nor the intoxicating liquors to be searched for and seized, are not particularly described. This objection was not made before the mayor, and is not included in the supposed affidavit of causes for appeal, but appears to have been first made in the District Court. The defendants having appeared before the mayor, and had a trial, without making this question, and it not being assigned as an error in the affidavit, it is not now open to inquiry.

The second error assigned to the proceedings of the District Court, is, the refusing the defendants a jury trial. The constitution, Art. 1, section 9, says: "The right of trial by jury, shall remain inviolate; but the General Assembly may authorize trial by a jury of a less number than twelve men, in inferior courts." Our law gives a jury of six, in trials before a justice of the peace. Sections 3358 and 3361 of the Code, have been so construed, as to leave in the District Court an authority to inquire into the appeal, so far as to determine whether a new trial should take place, and to grant or refuse it. See *Baurose v. The State*, 1 Iowa, 374. The section (3361) is ambiguous and difficult of interpretation, and that given it, may not be entirely satisfactory. In exer-

cising this authority, then, the court did not err. And whether it exercised it properly or not, is not made to appear. It is here assumed, that the general provision in the last-cited section of the Code, is applicable to this case, as to others; and that it is not superseded by anything in section 10 of the act in question. This is considered the true doctrine.

The next five errors assigned are:

3. In affirming the judgment of the court below.
4. In adjudging that the liquors were kept for the purpose of being sold, in violation of the law.
5. In adjudging that the liquors were forfeited.
6. In ordering the defendants to pay the costs of appeal, as well as those below.
7. In ordering that the liquors be destroyed.

There was a trial before the mayor, and a verdict rendered against the defendants by a jury; and if there was no error, for which the District Court should reverse the judgment of the mayor, and no ground upon which a new trial should be granted, then these things followed as legal consequences, and the court did not err therein.

The eighth error assigned, is "In overruling various other motions and questions, apparent upon the record, which is made part and parcel of this assignment of errors." This is too broad. It is not the office of the court to hunt for errors. And there is so much want of congruity between the positions taken in the different stages of the case—before the mayor—in the District Court, and in this court—that we may have noticed questions not really before us, but it has been our desire not to seem to avoid any question fairly presented. We are aware that some other points were started in the early stage of the case, but they have not been continued throughout the cause, and brought before us. Such is the irregular state of the papers, that it is somewhat difficult to ascertain what is properly presented. It may be, that there is *nothing* before us properly, for, to state one of the ambiguities of the case, the act, section 10, gives the defendant an appeal, if he, or some person for him, shall make an affidavit stating the

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fact, showing the alleged errors in the proceedings or judgment complained of ; *and it is questionable whether there is such an affidavit in the case.* We have, however, treated a certain paper, or certain papers, as such.

The judgment is affirmed.

WRIGHT, C. J. (dissenting).—On one question, discussed in the foregoing opinion, I find myself unable to concur with the majority of the court. That question arises on the construction given to section eighteen of the act of January 22, 1855, which reads as follows :

"SEC. 18. At the April election to be holden on the first Monday in April, A. D. 1855, the question of prohibiting the sale and manufacture of intoxicating liquor, shall be submitted to the legal voters of this State, and at said April election, a poll shall be opened for that purpose, at the place of election in each township of each county. The vote on said question shall be by ballot, and the voters in favor of such prohibition, shall cast a ballot, whereon shall be written or printed, the words, "*For the prohibitory liquor law ;*" and the voters opposed to such prohibition, shall cast a ballot, whereon shall be written or printed, the words, "*Against the prohibitory liquor law.*" The said ballot shall be received and canvassed by the judges of election, in the same manner as ballots for the election of officers, and a return of the same shall be made to the county judge, in the same manner and at the same time, as provided for in the election of officers at the April election. Such return shall be treated by the county canvassers, in the same manner as returns for the election of officers, and an abstract of said vote, made upon a separate sheet, shall be forwarded to the Secretary of State, in the same manner and at the same time, as provided in the cases of abstracts of votes for Superintendent and District Court Judges, elected at any April election. The returns of said vote, so returned to the office of the Secretary of State, shall be opened and examined by the Board of State Canvassers, in the same manner and at the same time, as in the case of returns of election of officers had at said April election. Im-

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mediately after such examination and canvass, the said Board of State canvassers shall make and publish an official statement of said vote; and if it shall appear from such official statement, that a majority of the votes cast as aforesaid upon said question of prohibition, shall be for the prohibitory liquor law, *then this act shall take effect on the first day of July, A. D. 1855: Provided*, however, that those portions of the act having relation to the election provided for in this section, shall be in force from and after its publication in the Iowa Capital Reporter and the Iowa Republican."

I pass over the objection, urged by the plaintiffs in error, that this section provides for the taking effect of the law in a manner not recognized by the constitution. If this section had been entirely omitted, I grant that the act would have taken effect, like all other laws, on the first day of July, 1855. And therefore, so far, I think, it might properly be disregarded. But in my opinion this section has a meaning and purpose beyond this—going to the very life and essence of the law—and as such courts cannot disregard it.

A statute may be constitutional in part, and unconstitutional in other parts, and the constitutional provisions be upheld. But not so, where the void provisions are vital to the execution of such as are constitutional—or where the act itself, is passed in a manner unwarranted by the fundamental law. And I also grant, that it is competent for the legislature to pass laws, the operative effect of which may depend upon a contingency—or upon the occurrence or non-occurrence of a particular thing. Indeed, most, if not all, the laws on our statute books are more or less of this character. In all such cases, the law is complete and perfect in all its parts—no other than the constitutional departments have aided in passing the same—it is the *will* of the law-making power, to be applied and become operative, when the law is violated, or when the citizen shall claim the benefit of its provisions. But I think it quite different, when the law is made to depend, for its creation and existence, upon the *will or voice* of any other body or power, than that to which such power is alone constitutionally delegated.

The distinction is not in all cases, perhaps, susceptible of definite explanation, but to my mind it is, nevertheless, clear and important. For instance, I think the legislature may give to the judges of the different counties, power to submit to the people the question, whether any extraordinary expenditure shall be made for the construction of roads, bridges or the like. Such a law is the *rule* prescribed, and is not dependent for its creation or life, upon the aid of any other power. Whether it shall ever be of any practical effect, depends upon circumstances, but it is nevertheless a law. But if, on the other hand, such a law had legislative sanction, dependent upon the sanction of the county judge or the people, it would have no life, without such approval, and I maintain that it is not competent for the legislature to give vitality to law, on any such method.

That this last proposition is true, I think, is manifest, and indeed, on this subject, I do not understand, from the opinion of the majority, there is any diversity of opinion. But it is claimed, that this law is not, by the 18th section, made to depend, for its life and existence, upon the contingency of a popular vote. In other words, that, though a majority of the votes cast at the said April election, had been "Against the prohibitory liquor law," the act would, nevertheless, have taken effect under the general provisions of the Code, on the first day of July. And this, I think, is the fair and legitimate result of the argument. For when the popular vote is disregarded in considering the existence of the law, it conclusively follows, that though the vote had been otherwise, this act would, nevertheless, be the law of the land. Or, in other words, the position is, that this section is of no force, so far as the life of the law is concerned—but it was to be enforced, whatever might be the result of that election; and that such election was only provided for, to test the minds of the people, and ascertain whether they would give their sanction thereto.

In the first place, I never could have obtained the consent of my mind, to declare this law in force, if the popular vote had been otherwise. And this, not because such holding

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would be in violation of public opinion, but because I should regard it contrary to the manifest intention of the legislature. I am not, in my position as a judge, to control that will, when exercised within constitutional limits—but to carry it out, according to the best lights I can obtain. And, to say that it was the legislative will, that this law was to take effect, and become a rule of action, whatever the result of this election, to my mind would most palpably violate that intention, as gathered from the law itself, and circumstances contemporaneous with its passage. To so hold, would be to say that this section means nothing—is a blank—that the legislature provided for all the trouble, expense and form of an election, for no end or purpose. If so, then it was a deliberate fraud upon the people, and one which I do not believe was intended or thought of. But further, I cannot forget, nor have I a right to, that the submission of this law to a popular vote, and the propriety and constitutionality of such submission, was a question much discussed before, at the time, and after the passage of the law. And when I find a provision making such submission, I cannot feel justified in saying, that it had not some practical end in view.

It is said, however, that the practical end was this: If the people decided in favor of the law, then, having the moral power arising from their concurrence, the law would be more likely to be enforced. But this position, I think, is clearly inconsistent with the argument, that the law would have taken effect, whatever the result of the election. For, to say that this vote was only to obtain the moral influence resulting from popular approval—and to hold that the law would be in force, in violation of popular sentiment, if so expressed at such election, would be to use an argument that destroys itself. The reply to this is, that if the vote had been against the law, then the law, though in force, would not have been executed, and the next legislature would have repealed the same, and thus carried out the will of the people. But if, in the meantime, prosecutions had been commenced under the law, or if the legislature, at a subsequent session, should fail to repeal the law, then it must necessarily have been ex-

ecuted, despite public opinion, and, as I think, in violation of the legislative intention, as expressed in the law itself.

But it is said again, that there are no negative words in this section; and that by the general provisions of the Code, this law would have taken effect by publication at the time therein fixed; and therefore, no conclusion can be drawn, that the vitality of the law was made dependent upon the will or vote of the people. Granting the premises, is the conclusion legitimate. Now, ordinarily, laws are passed to take effect from their passage; from their publication and distribution in pamphlet form; by publication in newspapers; on a day named, after such publication; or no time is mentioned—in which latter case, of course, the time of their taking effect would be regulated by the general law. The general law is, as before stated, that statutes shall take effect on the first day of July next after their passage. This section provides, that if it shall appear that a majority of the votes cast upon said question of prohibition, shall be “for the prohibitory liquor law,” then the act shall take effect on the first day of July—the very day provided by law for the taking effect of all other laws. Had the time of its taking effect been some other than that named in the general law, the argument drawn by the majority of the court, from the absence of negative words, would, to my mind, have been stronger than at present. Then, it might have been urged with more plausibility, that if the vote was in favor, it was to take effect at the time named (say first of June); if against, then, of course, at the time of all other laws. But as it stands at present, the argument is this: If the people approve, the law shall take effect on the first day of July, but if they should *not* approve, then it shall, nevertheless, take effect on the same day. Where, then, let me ask again, the necessity of the election? I answer, none, except for one that was illegitimate, and in violation of the constitution. I regard that by this section, the legislature intended to say, and have in effect said, this: If the people approve this law, then our will is, that it shall take effect at the time of all other laws; if they do not, then our will is, that it shall not

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take effect, either then or at any other time. In other words, notwithstanding the people have, by their constitution, vested legislative power exclusively in us, yet we will not exercise that power ourselves, but will call in the aid of a power unknown to the constitution. If this section does not mean this, then I affirm it means nothing.

But let me make one query here : suppose at this election, no vote had been cast, either for or against the law, in the entire state. Would it have been the law of the land? If not, then I say, it is conclusive that the law was not enacted by the constitutional power, but depended for its validity upon another power. If it would have been a law, then I say, it would have been such, in violation of the express will of the legislature—for that expressed will is, that it should take effect dependent upon this very vote, and in the case supposed, we have no vote.

Our constitution vests the legislative power of this state, in a Senate and House of Representatives, known as a General Assembly. To legislate, is to enact or make laws. To enact or make laws, is to decree or establish the will of the supreme power, which, under the constitution, is this General Assembly—limited, of course, by the charter which confers the power. Believing then, as I do, that the General Assembly have not declared their will unconditionally in the law, but have called in the aid of a power not provided for, nor contemplated, by the constitution, to assist in its enactment, I cannot hold it to be in force. It had no life—no vitality—when it left the hands of the General Assembly. For its creation, it had to depend upon the breath given it by the popular vote. Without this breath, thus given, it never was designed to have an existence. And with it, I must regard it as being created and brought into life, in violation of the spirit of a constitutional government.

This character of legislation is novel, and we have but few authorities on either side of the question involved. These authorities are cited in the opinion of the majority, and I need not refer to them. That the highest tribunals of the different states, should differ upon a question, involving so

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many nice distinctions, and susceptible of much argument on either side, is but natural. After all the reflection which I have been able to give to the question, however, I am reluctantly led to the conclusion above indicated. I say reluctantly, because I would certainly prefer, if consistent with duty, to have an entire concurrence on a question so unsettled, and subject to so much controversy. But while I thus dissent, I may say, in conclusion, that I concur with the majority of the court, on the other constitutional questions discussed. I have neither sympathy nor favor to bestow upon those constitutional objections, which are urged against the main principles involved in this law. To promote the happiness, peace and prosperity of the state, is the highest duty of the legislator, and I know of no more certain means of accomplishing this, than to suppress intemperance, pauperism and crime. Those laws which restrain men from doing mischief to their fellows, while they may diminish the natural, increase the civil, liberty of mankind. Natural liberty must be so far restrained by human laws, as is expedient and necessary for the general advantage of the public, in order to constitute political or civil liberty. This restraint should not, of course, be wanton and causeless, but have in view the public advantage, and the general freedom of the people in those matters of importance, which alone can secure perfect independence, and a prosperous and healthy state of society. These objects, this law, in my opinion, contemplates, and was designed to accomplish. But a law ever so beneficent in its design, or beneficial in its consequences, must become such by the action of the legitimate constitutional power; and if not so enacted, should no more receive judicial sanction, than if ever so pernicious and dangerous. And it is because I do not believe that this law was so framed, that I do most respectfully dissent from the opinion of the majority.

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and

CERTAIN INTOXICATING LIQUORS AND CEPHAS SANDERS,
WHO CLAIMS TO BE THE OWNER THEREOF v. THE STATE
OF IOWA.

Where a complaint under the act for the suppression of intemperance, alleged that certain intoxicating liquors were "kept in a certain house occupied and kept by one S., on a certain lot, and intended by said S. to be sold unlawfully; and where a motion was made to quash the information, on the ground that while the liquor is charged as being in the house of defendant, no affidavit of a sale, at any time, was made as required by the proviso to the ninth section of the act, which motion was overruled; *Held*, That the motion was properly overruled.

The word "house" in the ninth section of the act for the suppression of intemperance, approved January 22, 1855, is not equivalent to the words "dwelling-house," in the proviso to said section.

Where certain intoxicating liquors were seized under the act for the suppression of intemperance, and the owner appeared and pleaded as a bar to the complaint and prosecution, a previous conviction of himself, for keeping said liquors for sale; *Held*, That the conviction of the owner for keeping, with intent to sell, is not a bar to a prosecution against the liquors themselves, as a nuisance, and for the abatement of the nuisance.

And where in such a proceeding, the court refused to instruct the jury, that if the jury find from the evidence, that the owner of the liquors had previously been convicted of keeping said liquors, with intent to sell, they must find for the defendant; *Held*, That there was no error in the refusal to give the instruction.

Where a motion was made in a criminal case, for a new trial upon the ground that after the jury had retired, and before they returned into court, with their verdict, two of the jurors separated from their fellows, and conversed with other persons about their verdict; which motion was supported by an affidavit, which alleged "that after the jury retired to consider their verdict in the above cause, on Monday evening, and before they had returned their verdict into court on the Tuesday morning following, two of the jurors separated from their fellows, and were in the office of the affiant, and conversed in his presence about the case; and that afterward, they were present when the verdict was presented to the court," which motion was overruled; and where it appeared from the record, that on the day of trial, the parties agreed that the jury should seal up their verdict, after agreeing upon it, and return it into court on the next morning, and that on the next morning the jury returned a written and sealed verdict; *Held*, That the affidavit did not show that the jurors conversed with other persons, and that there was no error in overruling the motion.

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Error to the Scott District Court.

THESE cases were commenced under the Act for the Suppression of Intemperance, approved January 22, 1855. In the first case above entitled, an information was filed before a justice of the peace of Scott county, against the defendant, charging him with a violation of section seven of the Iowa liquor law. On the 3d day of September, 1855, the defendant appeared, pleaded not guilty, was tried, convicted, and fined twenty dollars and costs, and the house declared a nuisance, &c. The defendant appealed to the District Court. After filing motions to dismiss proceedings, and a demurrer to the information (raising the questions now presented to this court), and which were overruled, he was again tried and convicted, and judgment was rendered by the District Court against him, pursuant to the above-named section of the liquor law.

The second case arose under the ninth section of the act. On the 31st day of August, 1855, an information of three citizens of the county, was filed before the same justice, charging that the informants have reason to believe, and do believe, that in said Scott county, to wit: in the city of Davenport, in a certain house or place known and described as being the house occupied and kept by one Cephas Sanders, on the north end of lot three in block twenty-five, in the old town (now city) of Davenport, intoxicating liquors are kept by the said Cephas Sanders, to wit: brandy, whiskey, and beer, and other intoxicating liquors, the particular names of which affiants are not advised; and the said intoxicating liquors are intended by the said Cephas Sanders to be sold unlawfully, &c. A warrant was thereupon issued by the justice, which was returned served, by seizing certain intoxicating liquors therein described. The justice then issued a notice as required by the tenth section of the act, returnable on the 7th of September, 1855, which was duly served. At the time set for the hearing in the notice, Sanders appeared, claimed to be the owner of the property

seized, and was allowed to defend. His counsel then moved to quash the proceedings, for the following reasons:

I. The information is defective and invalid, because that while the liquor is charged therein as being in the house of defendant, no affidavit of the sale of any liquor is made, as the statute requires, before warrant of search can issue.

II. The statute upon which the prosecution rests, is in contravention of, and in conflict with, the constitution of the United States and the state of Iowa, in this:

1. It provides for the searching of houses, and seizing of property, without first requiring a particular description of the place to be searched and property to be seized.

2. It provides for the destruction of property, without notifying the owner thereof, or making it necessary that he should be notified.

3. It violates that provision thereof, which declares that *the right of the people to be secure in their houses and effects against unreasonable search, shall not be violated.*

4. It provides for the forfeiture and destruction of private property, without trial, and as a penalty for a crime, *the commission of which had not been proved.*

5. Because it is a criminal prosecution, and the law does not make it necessary to inform the defendant of the accusation against him, *nor is it necessary that he should be confronted with the witnesses against him.*

6. Because the statute under which the proceeding is commenced, is not a valid and existing law of Iowa, nor can be, for that the legislature of the state, in the making thereof, delegated the power of its taking effect, to the contingency of a vote of the people in favor thereof.

7. It is invalid, in this, that it presumes the guilt of the accused, and throws upon him the burden of proving his innocence.

8. The act is in violation of the constitution of the state of Iowa, for that it confers jurisdiction upon justices of the peace, to adjudicate upon, and render final judgment upon, an unlimited amount of property.

9. It authorizes the abatement and destruction of property

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both real and personal, upon the mere fact that the liquor is found on the premises, and without any other proof.

Which motion, and also a demurrer to the complaint, were overruled. The defendant then filed his plea, as required by section ten of the act, and also a plea of former conviction; and after hearing the testimony, the justice adjudged that the liquor be forfeited, and that Sanders pay the cost of the proceedings. The defendant appealed to the District Court, where the same motion to quash the proceedings was heard and overruled, and a trial had before a jury. On the trial, the defendant asked the court to instruct the jury as follows:

1. That if the jury find, from the evidence, that Sanders, who claims to be the owner of the liquors seized, was arrested, and at the same time a prosecution was instituted against him, for keeping the said liquors with intent to sell the same, and was convicted of that offence upon the testimony that has been offered by the state, to sustain this charge against the liquors and himself, they will find for the defendant.

2. That if the jury find from the evidence, that for the same offence, that is to say, the keeping of the liquors seized, by Cephas Sanders, with intent to sell the same, the said Sanders has been before convicted, they must find for the defendant.

These instructions the court refused to give. By agreement, the jury was permitted to seal up the verdict after it was agreed upon, and return it into court on the next morning. The jury found a verdict for the state, and thereupon the defendant filed a motion for a new trial, upon the ground that after the jury retired to consider of their verdict, and before the same was returned by them into court, the jury separated, and after their separation, they, on the morning of the following day, returned into court a sealed verdict, and were not conducted into court by the officer who was sworn to attend them; neither were they in charge of an officer, when they came into court, and returned said verdict; and also because the verdict was against the law and evidence.

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This motion was supported by the affidavit of Cavanaugh, which alleged that after the jury had retired to consider of their verdict, on Monday evening, and before they had returned the verdict into court on the following morning, two of said jurors—Palmer and Allen—separated from their fellows, and were in the office occupied by this affiant, and conversed in his presence about the case, and that afterwards the said jurors came into court, and were present when the verdict was presented to the court. The motion for a new trial was overruled, and thereupon a judgment of forfeiture was rendered against the liquors. From this judgment, the defendant sued out his writ of error, and in this court assigns the following errors:

1. In overruling the motion to quash the information.
2. In refusing the instructions asked for by the defendant.
3. In overruling the motion for a new trial.

W. E. Leffingwell, for the plaintiff in error.

These cases we propose to consider at the same time, and as one case, for the purposes of the argument, both arising under the same statute, and growing out of the same cause; the prosecution in the first-named case, being based upon the seventh section of the act of January, 22, 1855, entitled "An act for the suppression of Intemperance," which prohibits the *selling*; and the other, upon the ninth section of the same act, which provides for the *search, seizure and destruction* of liquors. This act, we think to be in conflict with the constitution of this state, and as some of the many objections to its validity, we urge the following: first, however, presenting to the court the fact, that the statute is in its nature a penal statute, and as such should be strictly construed. *Smith v. Spooner*, 3 Pick. 229; *Commonwealth v. Fourteen Hogs*, 10 Serg. & Rawle, 395; *American Fire Ins. Co. v. United States*, 2 Peters, 867; *Stuart v. Commonwealth*, 10 Watts, 809; *United States v. Wilson*, Bald. 101; *Fisher v. McGirr et al.*, 1 Gray, 1.

1. The act is in conflict with the first section of the bill

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of rights, which enumerates among the inalienable rights of all men, the right of "*acquiring, possessing and protecting property.*" That intoxicating liquor is property, having an intrinsic value, recognized as an article of commerce, cannot be denied. It has been so considered by the Supreme Court of the United States, in *Brown et al. v. State of Maryland*, 6 Cond. Rep. 554; *M'Cullough v. State of Maryland*, 4 Cond. 466. It was so regarded in *Green v. Briggs*, 1 Curt. C. C. 337. And it is so recognized in the statute under consideration, which authorizes its purchase and sale by agents, upon the account, and for the *profit*, of the different counties of this state. Is not then the act, so far as it regards the selling of intoxicating liquor, within the inhibition of the constitution, above quoted? How can a man acquire property in a more legitimate manner, than by purchase? Yet he is restrained from purchasing, by reason of a penal statute prohibiting the sale of the article of property, which the declaration of rights says he may *acquire, possess and protect.*

We are aware that the Supreme Court, in the series of cases under the license laws, reported in 5 Howard, 540, have recognized the right of states to establish and control their own police regulations, by placing restrictions upon the sale of intoxicating liquors. And why have they come to this conclusion? They say, that it is because "we can find nothing in the constitution of the United States, or the laws of Congress, which authorizes us to interfere with such a policy adopted by the states." That court has gone no farther than to examine the constitution of the United States and the laws of Congress, and so long as a state law is not in conflict with them, it will not be disturbed by that Court. But the clause above quoted from the bill of rights, section one, is not to be found in the constitution of the United States. It is the first declared right of the people, in their reservation, upon the adoption of the constitution, and their distribution of the powers of the government under it. And although the state may, by her authority to establish police regulations, for the protection of the lives and health of her citizens, by the most rigorous laws, restrict the sale of

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any article which may be deemed noxious or dangerous—yet, when the attempt is made to prohibit every, or any man, from *acquiring and disposing* of such property, the act of legislation which seeks to accomplish it, is in violation of the constitution. Restriction differs from prohibition, in this: Restrictions, however severe, may be imposed upon the sale of any article; yet every man has an opportunity of trafficking in that article, by bringing himself within the restrictions imposed by that law, and under it, he may “*acquire and possess*” property. But prohibit the sale of that article absolutely, and no man can “*acquire and possess*” it. Hence, under our constitution, a *restrictive* law may be properly enacted, but a law *prohibiting* the acquisition of property, cannot. In *Calder v. Bull*, 2 Dall. 389, the Supreme Court of the United States says: “The right of property is always subject to the rules prescribed by the positive law.” What law is superior to, or more positive than, the constitution?

2. The next objection is, to the manner in which the law was enacted. The law was enacted to take effect as a law, upon the contingency that a majority of the voters of this state should, at the April election, 1855, vote in favor of its being the law, in which event, it should take effect on the first day of July next following. See § 18. This mode of enacting laws, is not in harmony with the constitution of this state. Upon its adoption, the people delegated to and vested in the General Assembly all legislative power (Art. 3, Const.), reserving to themselves, however, the right to express their approbation, or disapprobation, of a law in relation to the increasing of a state indebtedness, and in no other instance. Art. 7 Const. Having delegated this power to one of the co-ordinate branches of the government, by the constitution, they cannot re-invest themselves with it, until they have abrogated it. “Every government,” says Judge STORY, “must include within its scope, at least if it is to possess suitable stability and energy, the exercise of the three great powers, upon which all governments are supposed to rest, viz.: the executive, the legislative and the judicial powers. The manner and extent in which these pow-

ers are to be exercised, and the functionaries in whom they are *vested*, constitute the great distinctions which are known in the forms of government." 2 Kent Com. 1. The legislature is, then, the law-making power, and the statute law, which is "the express written will of the legislature, rendered authentic by certain prescribed forms and solemnities" (1 Kent, 416), can be derived from no other source.

Among the forms and solemnities prescribed for giving effect to a law, the 3d article of the constitution, section 27, provides, that "no law of the General Assembly, of a public nature, shall take effect, until the same shall be published and circulated in the several counties of this state, by authority. If the General Assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the state." Can effect be given to a law in any other way? *This Court* has already decided *that it cannot*. In the case of *Scott v. Clark et al.*, 1 Iowa, 70, in determining the effect of the law under which the question before the court arose, the court said, "That the power conferred upon the General Assembly by the 27th section of the 3d article of the constitution, *cannot constitutionally be conferred upon the Governor*, or any other person." In delivering the opinion of the court, in the case of *Parker v. Commonwealth*, 6 Barr, 518, Justice BELL refers to the remarks of Chief Justice BOOTH, of Delaware, in an analogous case, and quotes from that opinion as follows: "The absurd spectacle of a governor referring it to a popular vote, whether a criminal, convicted of a capital offence, should be pardoned or executed, would be the subject of universal ridicule; and were a court of justice, instead of deciding a case themselves, to direct the prothonotary to enter judgment for the plaintiff or defendant, according to the popular vote of a county, the community would be disgusted with the folly, injustice, and iniquity of the proceedings." And in the same connection, the court say: "And yet, these branches of the government derive their authority from the same instrument which confers the powers of legislation upon the General Assembly, and are

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not more strongly restrained by its terms, than is the latter body, from devolving their duties and responsibilities upon others. But neither of these departments can absolve itself of the task appropriate to it, by substituting others, not called to its discharge by the constitution. None of them can legally invite the people, to exercise a function which the constitution makes the peculiar duty of selected bodies of persons, and therefore, in effect, *denies to every other person*. Nor can they call to their aid the mass of community, *except in the modes prescribed by the fundamental law*. To permit either of these courses, would be to loosen the hold of society from its greatest safety, by removing all accountability, and thus subjecting the minority to the unrestrained decisions of irresponsible and fluctuating majorities." *Parker v. Commonwealth*, 6 Barr, 519. It was said by Mr. Justice JOHNSON, in *Johnson v. Rich*, 9 Barb. 686: "Of all the evils which afflict a state, that of unstable and capricious legislation, is among the greatest." Statutes, then, which claim no higher origin, than the will of the majority of a capricious people, are framed and erected upon an unstable and treacherous foundation, the duration of which is measured by their interests and passions—a foundation, which the receding flood may carry with it—a fabric, which the slightest gust of passion may sweep away. "*Salus populi suprema lex est*," is a trite and truthful maxim. But that law which will secure the *safety of the people*, must be built upon the rock of the constitution. *Barto v. Himrod et al.*, 4 Selden, 483; *Thorn v. Kramer*, 15 Barbour, 112; *Bradley v. Baxter*, 7 How. Pr. 13; *Parker v. Commonwealth*, 6 Barr, 517.

3. We insist that the 9th section of said act, is in direct violation of the 8th section of the bill of rights. The 9th section of the act provides, that "upon information of three residents of any county in the state, supported by oath, that they *have reason to believe*, and do believe, that intoxicating liquor, described as *particularly as may be*, is in any place in said county, described as *particularly as may be*, kept or owned by any person, named or described as *particularly as*

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may be, and is by him intended to be sold, &c., the warrant of search may issue, directing the officer to search the premises, and seize the liquors, and deposit them in some secure and convenient place, until the determination of the cause." The 8th section of the bill of rights declares: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, *shall not be violated*; and no warrant shall issue but on probable cause, *supported by oath or affirmation, particularly describing the place to be searched, and the papers and things to be seized.*" Under the act of January 22, 1855, the information is not required to issue against any particular thing, or for the search of any particular place. It is, in its character, a general warrant, which issues not upon *probable cause, supported by oath*, but issues upon the bare suspicion of a cause, a suspicion which is not justified by the bill of rights. General warrants have ever been in bad odor; in this country, they have been strongly guarded against by the framers of the constitution; in England, before its adoption, they were discountenanced, and since the decision of Lord Camden, in *Eutich v. Carrington*, 2 Wils. 275, and 19 Howell S. Trials, 1029, are entirely unknown.

The act pre-supposes the guilt of the owner, if one shall appear and claim his property, although that owner need not be notified (unless known to the officer), and if he does not appear, then the property is declared forfeited. And for what cause? It is not necessary that any proof should be adduced upon the hearing, that the liquor seized was kept for the purpose, and with the intent of the owner, to be sold—for that owner or keeper's name had not been mentioned in the complaint or warrant. The information is filed, stating the belief of the informant, that it is kept for the purpose of sale. That informant need not again appear. The officer makes the search and seizure under the warrant, and he returns that he has found liquor; if no owner appears, the liquors are declared forfeited, and destroyed, and this under the authority of the act. Is this consistent with the provisions of the constitution, which guarantees to every

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man the enjoyment of his property? Is he protected in the possession of it? It will undoubtedly be claimed, that it is destroyed as a nuisance. But where is the judgment which declares it a nuisance—which confiscates it, and wrests it from the possession of its owner? It is found in the *sentence* of the act, and not upon the records of the court, supported by the law and the proof. Before search or seizure—before the complaint is filed, or warrant is issued—the judgment is pronounced; and pronounced by a tribunal (the legislature), omnipotent in its proper sphere—in the exercise of “such powers as have been delegated to it”—yet when it steps beyond that boundary, its acts, like those of the humblest magistrate, who transcends his jurisdiction, are void. 4 Hill, 144. “Their acts are mere legislative acts; and when they attempt the exercise of *judicial* functions, under color of the grant, they are mere acts of usurpation, without validity or force.” *Wilkinson v. Leland*, 2 Peters, 627; 1 Gray, 1; 5 Hill, 367; 5 Cowen, 348. It is not a law; “it is in the form of a law, but is in substance a decree.” *Jones v. Perry*, 10 Yerger, 59. And in *Wilkinson v. Leland*, 2 Peters, 657, Judge STORY says, “That government can scarcely be free, where the estate of the citizen can be transferred, *without trial, without notice, and without offence.*”

So, in *Doe v. Douglass*, 8 Blackf. 10, the court says: “The legislature is supreme, except wherein restrictions have been imposed. The restrictions of the constitution restrain the legislature from the *performance of a judicial act*, and from any flagrant violation of the rights of private property. See also, 9 Gill & Johns. 408; 13 Wend. 328; 2 McCord, 55; 4 Dev. 1; 3 Greenl. 326. That “no man shall be deprived of life, liberty, or property, without due process of law,” is a familiar maxim, which was incorporated into *Magna Charta*, nearly three hundred years before the discovery of this continent; it was made the essence of the 29th chapter of that instrument, when the barons of England *demand*ed it, as a right for the people. It has ever been regarded with jealous care, by our statesmen and jurists, and well might

we shudder at the thought of its being torn from the shield of our rights, by the hand of reckless legislation.

The accused, in the defence of his life, his liberty, or his property, may plant himself upon the constitution, and *demand*—not ask—what he has secured to himself by it—the right of trial by jury; that the charge against him shall be clearly and specifically set forth against him; that he be “*informed of the nature of the accusation against him*; that he be confronted by his accusers;” and that he may have his own witnesses. This is his right, and this is the mode, the only mode, of affecting, his life, liberty, or property, for an offence committed by him. 10th article of the bill of rights. These are the rules prescribed, and this the character of evidence required; and in the language of Lord ERSKINE: “The rules of evidence, as they are settled for the general administration of justice, are not to be overruled or tampered with. They are founded in the charities of religion—in the philosophy of nature—in the truths of history—and in the experience of common life; and who ever ventures rashly to depart from them, let him remember, that it will be meted to him in the same measure, and that both God and man will judge him accordingly.” 24 How. State Trials, 965. Then, if the opportunity is not given him by the act, to meet his accuser face to face, the law is unconstitutional. *Commonwealth v. Albro*; *Fisher v. McGirr et al.*; *Herrick v. Smith*, 1 Gray, 1; *Green v. Briggs*, 1 Curt. C. C. 311; 4 Hill, 140; 9 Gill & Johns. 408; 7 Porter, 294; 1 Murphy, 87; 5 Hill, 359. In *Jones v. Perry*, 10 Yerger, 59, the court say, that, “the legislature cannot sit in judgment, try causes, and apply the rules of law to them, make decrees, and much less can they make decrees in the exercise of an arbitrary power, independent of, and in opposition to, the rules of law.”

This act, also, confers jurisdiction on justices of the peace, to adjudicate and pronounce judgment of forfeiture upon an unlimited amount of property (*Commonwealth v. Albro*, 1 Gray 1), while the constitution, art. 11, sec. 1, limits and defines the extent of their jurisdiction.

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In the very recent cases of the *Commonwealth v. Albro*; *Fisher v. McGirr*; and *Herrick v. Smith*, 1 Gray, 1, the Supreme Court of Massachusetts unanimously say, that the Massachusetts act, which is precisely like our own, "is contrary to the 8th section of the bill of rights, declaring the subject to be free from unreasonable searches and seizures, because it neither requires the name of any person keeping said liquor, with intent to sell the same, to be named in the complaint or warrant of search—nor limits the officer's right and authority of seizure, to the liquors described in the complaint. This section also disregards other precautions and safeguards for the security of persons and property, described by the declaration of rights, inasmuch as it prescribes for the destruction of private property, and the punishment of its owner or keeper, without his being summoned (unless known to the officer) to appear before a magistrate, and without giving him an opportunity to defend, and meet his witnesses face to face, and providing legal proof and trial of the offence of keeping the liquors, with the intent to sell the same. This section, therefore, is unconstitutional and void, even when so framed and conducted as to avoid these objections."

We simply present the objections embraced in our 3d, 4th, and 5th assignments of error, in the case against the liquors, &c., viz: The exclusion of the record of a former conviction, offered in evidence by the defendant; the refusal of the court to instruct the jury as to the effect of a former conviction, as requested by the defendant; and the overruling of defendant's motion for a new trial, which was supported by an affidavit, that the jury, after they retired to consider of their verdict, separated and conversed with other persons, before they had agreed upon, and returned their verdict into court; that they may be considered by the court, believing that either of the errors assigned, would be sufficient to reverse the judgment. The other objections, we more strongly urge, feeling the importance of an early construction of the statute under consideration. Neither are we insensible to the extreme solicitude which courts feel, when called on to

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disturb an act of the legislature, upon the ground of its unconstitutionality; and its operation is never retarded, unless the defect is apparent. But when its defects are clearly seen, the judiciary have boldly grappled it, and with a steady hand applied the amputating knife, to relieve the constitution of those festering spots, which threatened to mar its beauty, and impair its strength.

Cook & Dillon, for the state.

We now proceed to consider the various errors complained of, premising, however, that in consequence of the elaborate, able, and learned argument of the attorney-general,[1] we shall discuss the points which are presented, much more briefly than we otherwise should, in a case of such magnitude, and involving questions so momentous and important. The first error assigned is, that "The legislature had no power to submit the passage of the law to the people of Iowa."

The able argument of the attorney-general on this point, has left us little to add; and that little we shall add mainly, by quoting from the opinion of REDFIELD, C. J., in the case of *State of Vermont v. Parkes*, as reported by himself in *Livingston's Law Mag.*, January, 1855, 13. After reviewing the decisions in Delaware, New York, and Michigan, and showing them not to be in point (nor are they in point under the Iowa Liquor Law), he says: "In regard to the statute of 1852, it cannot with any degree of fairness be said [and this is true in respect to the law now under consideration], that the legislature did not enact the law, and fully pass upon all questions of constitutionality or expediency involved in the subject." "*It is admitted on all hands*, that the legislature may enact laws, the operation or suspension of which, shall be made to depend upon a contingency. This could not be questioned with any show of reason or

[1] These cases, and the preceding case of *Santo et al. v. The State*, were heard together, and the argument of all of them, were participated in by the respective counsel engaged. The argument of the attorney-general, referred to by Messrs. Cook & Dillon, is given in the preceding case.—REPORTER.

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sound logic. It has been practiced in all the free states, for hundreds of years, and no one has been lynx-eyed enough to discover, or certainly bold enough to declare, that such legislation was, on that account, void or irregular. And it is, in my judgment, a singular fact, that this remarkable discovery, should first be made in the free representative *democracies* of America." "It seems to me, that the distinction attempted between the contingency of a *popular vote*, and other *future uncertainties*, is without all just foundation in sound policy or correct reasoning. And we may find any number of cases in the legislation of Congress, where statutes have been made dependent upon the shifting character of the revenue laws, or the navigation laws, or commercial rules, or the restrictions of other countries." "The same is also true of acts of Congress, by which power is vested in the president, to levy troops or draw money from the public treasury, upon the contingency of a declaration or an act of war, committed by some foreign state, empire, kingdom, prince, or potentate. If these illustrations are not sufficient to show the fallacy of the argument, more would not avail." See *Commonwealth v. Williams*, 11 Penn. 61; 8 Barb. 391; 9 Ib. 685; 10 Ib. 214; 20 Ohio, App. 1; and others cited by REDFIELD, C. J. There is no doubt of the principle, that such parts of a statute only will be adjudged void, as plainly and palpably conflict with the constitution, and the rest of the statute will be held valid and binding. 6 Howard, (Miss.) 625; *Fisher v. McGirr*, 1 Gray, 1; Livingston's Law Mag., September, 1855, 548.

Suppose section 18 of the Iowa liquor law (which provides for a submission to the people), be held unconstitutional, yet under section 27 of article 3d of the constitution, and section 22 of the "Code," the residue of the law went into force and effect on the 1st day of July, 1855. If a majority of votes had been cast against the law, we see no reason why it would not, like all other general laws, have taken effect on the 1st of July. Section 23d of the Code, provides for the taking effect of statutes, depending on a *future contingency*. Whoever thought that this section of the Code

was, therefore, not constitutional? This objection proceeds upon the assumption, that the legislature *have delegated* the law-making power to *the people*, in the passage of the Iowa liquor law. How? in what respect? surpasses our ingenuity to divine. But this may be truly styled, a constitutional age; a Young America era. Constitutional questions are not now left to the determination of an enlightened judiciary, but their province has been invaded, and their jurisdiction almost ousted, by political conventions—by men who lean against lamp-posts for support, and by beardless boys in their teens, all of whom *learnedly* (?) discuss, and dogmatically pronounce on, the constitutional obligation of laws. This disposes of the 1st and 2d errors assigned. The third error assigned is, "That the law presumes the guilt of the defendant, before he has been proved guilty by competent proof." Section 5th relates to, and prohibits the manufacture of the prohibited intoxicating liquor, and contains no provision as to evidence or presumption of law. Section 6th relates to, and prohibits the sale of, intoxicating liquor, and contains nothing upon which to base this assignment of error. This objection, then, must relate to the 7th section, which provides "that upon the trial of every indictment or information for violations of the provisions of this section, proof of the finding of the liquor named, &c., *except* in the private dwelling-house of the defendant, shall be received and acted upon by the court, as *presumptive* evidence that said liquor was kept or held for sale, contrary to law."

And in section 8 it is provided, that proof of the manufacture, sale, or keeping with intent to sell, contrary to law, by the accused, in or upon the premises described, shall be deemed sufficient *presumptive evidence* of the offence provided for in this section. These provisions do not support the error complained of above, viz: that the law presumes the guilt of the defendant before proof, inasmuch as these sections expressly require proof of certain *facts*, and when proved, the law only raises and declares a presumption which naturally arises from, and attaches to, a certain state

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of facts which have been established by proof. Such provisions are usual and common. See Code, § 926.

We deny that this law *presumes* the guilt of the accused, without *proof*, or that it changes the rules of evidence; on the contrary, the accused, by explicit provision, is to be regularly informed against, or indicted; he has his day in court; his plea of not guilty, puts the state upon full and plenary proof, before a jury of his fellows; and he has the express right of appeal, without any unusual limitation or restriction. But suppose the act does change the rules of evidence, or prescribes and creates new rules of evidence, yet these are confessedly within legislative competency. Code, §§ 2921, 2927, 2624, and 2643; 1 U. S. Stat. at large, 677; 1 Cond. Repts. 593; 16 Peters, 342; 1 Greenl. Ev. § 33; Arch Crim. Plead. and Ev. 124.

The 4th assignment of error is, that "this law violates that provision of the constitution, which provides that every defendant charged with the commission of a crime, shall have the charges fully and distinctly specified, and presented against him." We are not aware of any such provision of the constitution, but presume reference is had to section 10 of the bill of rights, which merely provides, that "the accused shall have a right to be informed of the accusation against him." There is nothing in the liquor law which attempts to deprive a defendant of this common law and constitutional right; but, on the contrary, this law expressly declares, that the accused shall, in all cases, be tried on an *information*, on oath, regularly filed, or an *indictment* regularly presented. We discover nothing unusual in section 18 of the law, and without saying more on a matter so plain, we refer to the following analogous provisions of the Code of Iowa. Code, §§ 2624, 2643, and 2921-2927.

The next error complained of is, that this law is in direct violation of the 1st section of the bill of rights, which declares, that "all men have a right to acquire and protect property," and "that this law provides for the destruction of property, without notifying the owner thereof, or making it necessary that he should be notified." How does the law

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interfere with the "right to acquire and protect property?" It does not do so. Does the defendant in this case contend, that the legislature does not possess the power, to declare that *certain* property kept for certain purposes, is illegally kept; and that being so kept, it is noxious to the public, and *de facto* a nuisance, and is subject to be abated and destroyed? All governments have the power to prohibit the use of property, under certain circumstances, for certain purposes, and of declaring it a nuisance, and abating and destroying the same as such. See brief of attorney-general; also, see Code, § 2726, which provides for the *destruction* and *forfeiture* of adulterated food and liquor. Also, section 2728, as to forfeiture and destruction of adulterated drugs and medicines; and section 2760, prohibiting the manufacture of gunpowder within eighty rods of any other building, and if so manufactured, subjecting the person to criminal prosecution, and the building to destruction as a nuisance. And by section 2761, houses of ill-fame, gambling-houses, and houses where drunkenness, &c., are carried on, are nuisances, and may be abated and destroyed.

What difference is there, in principle, between section 2725 *et seq.*, of the Code, and the Iowa liquor law, as regards property, in prohibited intoxicating liquors? None at all. See Code, § 2735. Similar provisions may be found in the laws of every state in the Union, providing for the *forfeiture and destruction of property*, under certain circumstances. Among others, *vide* Mississippi Code, 945; Virginia Code, chap. 28, 210; Revised Stat. Mass. 743; Revised Stat. Wis. chap. 140, 711. The whole doctrine is fully discussed and settled, 5 Howard (U. S.), 504. There is no force or truth in the objection, that the law provides for the destruction of property, without notifying the owner thereof, &c. The proceeding against the liquors, sections 9 and 10, are merely proceedings *in rem*, and section 10 expressly requires notice, and prescribes the manner in which it shall be given. The citation of this section is a full answer to this objection; and at the time and place of trial, any person claiming an interest in the liquor and vessels, may appear and defend.

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The issue to be tried, the judgment to be rendered, and the whole proceedings, show that the entire matter is a proceeding *in rem*; and though judgment may be rendered for costs against a party who voluntarily defends, yet this judgment is collectable only by execution, as in civil cases, and not by imprisonment.

The next constitutional objection is, that "The Iowa liquor law violates that provision of the constitution, which declares 'that the right of the people to be secure in their houses and effects against unreasonable search, shall not be violated.'" That this objection is far-fetched and untenable, requires no argument to demonstrate. A glance at section 9, will show at once its groundlessness and futility. The law could not well be devised, which would more carefully guard the rights of the citizen in this respect. The liquor law is much more rigid and particular, than the general law, on this subject, as contained in the 27th chapter of the Code, and more so than any law we have ever seen on the subject of searches and search warrants. The Massachusetts law did not "require the complainants to state, either as a fact or belief, that the defendant, or any person designated, has kept, or is keeping, liquor for sale contrary to law." The Iowa law does require this. And without further specification, the court will find that the Iowa law, *is not obnoxious to a single objection* which the Supreme Court of Massachusetts, in *Fisher v. McGirr*, urged against the search and seizure provision in their law; but on the contrary, our law seems to have been carefully framed to purposely avoid the objections of C. J. SHAW, in the case referred to.

The next objection to the law is this, "That it violates the constitution, for that it confers jurisdiction upon justices of the peace to adjudicate upon, and render final judgment upon, an unlimited amount of property." There is no basis for this objection. *What* section of *what* article does this law violate, on this subject? Can it be found? We have never seen it, and are unable to find it. Nor have we ever been able to find any section of the liquor law, giving justices

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of the peace power to render final judgment; on the contrary, in all cases arising under this law, an express appeal is allowed, and justices of the peace have no exclusive jurisdiction, and cannot pronounce any conclusive and final judgment.

The next objection is, "That this law authorizes the abatement and destruction of property, both real and personal, upon the mere fact that the liquor is found on the premises, without any other proof." This complaint against the law, is as groundless as the last. The law does not authorize any such thing. A recurrence to the law, to see what it does require in this respect, and this objection stands refuted. We dismiss it, therefore, without further argument. The next assignment of error is, "That the court erred in excluding the record of a former conviction, offered in evidence by the defendant, under his plea of *autre fois convict*." We very much doubt whether this point will be seriously urged in this court, but having been made, we will say a few words in reference to it, and but few words are required to show that it is not well taken. The plea of *autre fois convict* was filed in the case of "*The State v. Certain Intoxicating Liquors, and Cephas Sanders, who claims to be the owner thereof*." The information and whole proceedings in the case, were based upon sections 9 and 10 of the liquor law. Under section 10, Cephas Sanders came into court, and claiming an interest in said liquor, he filed his written plea, that the said liquor claimed by him, was not owned or kept with intent to be sold, contrary to the law, &c. "Cephas" himself, had been before convicted under section 7, and judgment *in persona* had been rendered against him, pursuant to the provisions of that section. And in the proceedings under sections 9 and 10 against certain liquor, &c., Cephas, who voluntarily appeared to defend for the liquor, offers in evidence, as a bar under the plea of former conviction, the record of his *own prior personal* conviction under section 7. This the court below excluded, and the exclusion was proper; for although he had been *personally* convicted for a violation of section 7, in owning and keeping intoxicating liquor, with intent to

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sell the same, contrary to law, yet that does not bar the state from proceeding against the *liquor itself*, under sections 9 and 10. Suppose A. has been convicted under section 5, of a charge of unlawfully manufacturing intoxicating liquor, does that bar the state from proceeding against such manufactured liquor, and on the proper charge and proof, prevent such liquor from being adjudged forfeited? On the other hand, if liquor is, on the proper charge and proof, declared forfeited, does this *bar* a proceeding against the *manufacturer* under section 5, for a violation of that provision, and can a man plead a judgment of forfeiture under sections 9 and 10, against the *liquors*, in bar of a prosecution against *himself*, for illegal *manufacture* or sale. Is his *liquor* and *himself* identical, one and the same? Are they, as Webster said of Liberty and Union, "one and inseparable?" Looking at the object and intent of the law, the position seems to us to be the climax of absurdity.

According to the doctrine of the defendant, if you proceed against the liquor, you are debarred from proceeding against the *seller* or *manufacturer*, and *vice versa*—a construction which would completely defeat the intent, policy, and effectiveness of the law. The offence created by section 7, is not the same; nor does it embrace the offence provided for in section 9; and therefore, a conviction or acquittal of one, is not a bar to a prosecution for the other. *State v. Brown*, 16 Conn. 54; Archbold's C. P. 82; *People v. Barrett*, 1 Johns. 66; *Commonwealth v. Cunningham*, 13 Mass. 245; *Gerard v. People*, 3 Scam. 363. It is certainly an unusual proceeding, to plead a *personal conviction* in bar of a proceeding *in rem*, or *vice versa*.

The other errors assigned, it is not necessary to notice, as the court will see from the record, that they are not well taken. In conclusion, permit us to say, that we are glad these important questions are to be adjudicated by an impartial and intelligent tribunal, and one that will not, on imaginary grounds, or for slight reasons, nullify and strike down a solemn act of the legislature, which has received the

express sanction, and emphatic approval, of a large majority of the electors of the state.

Platt Smith, for the plaintiff in error.

This case involves the question of the constitutionality of the liquor law. The first point to which we call the attention of the court is, that the so-called act, is not an act of the legislature; it is not a law. The constitution of Iowa, (art. 8, sec. 1,) divides the government of Iowa into three separate parts: "the legislative, the executive, and the judicial." The legislative department is charged with the duty of making the laws. The old maxim, *delegatus non potest delegare*, applies with full force. Neither of these departments can transfer or delegate its authority or function to the other, or to any other person. Thus it has been decided by this court, in the case of *Foley v. Carson*, at the June term, 1854, that section 1797 of the Code, providing that the court, by consent of parties, may select a person to act as judge in a particular case, is unconstitutional and void, and that a judgment rendered by a person, who was duly selected by the court and the parties, was null and void, on the ground that the judicial power of the state was vested by the constitution, in judges to be elected according to the provisions of the constitution; hence, it was not in the power of the legislative department, to authorize "the court, with the consent of parties," to delegate this power to another person.

So, with the legislative department; those acts which the constitution requires the legislature to do, cannot be done by proxy; the power cannot be transferred or delegated to any other department or person. Section 27 of the 8d article of the constitution provides: "If the General Assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the state." The legislature, at the last session, undertook to delegate this authority to the governor, and provided, by express act, that when the "governor shall deem it necessary," he may cause the laws to be published in a newspaper, and that the laws thus published, should

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take effect, &c. See acts of 1855, page 69. This court, at the June term, 1855, held said act unconstitutional. *Scott v. Clark et al.*, 1 Iowa, 70. The court, in speaking of the power of the legislature to delegate this power to the governor, says: "It cannot constitutionally be conferred upon the governor, or any other person." In the present case, the legislature, instead of making, publishing, and distributing the law, as the constitution provides, merely proposed a law to the people, and provided that "the question of prohibiting the sale and manufacture of intoxicating liquor, shall be submitted to the legal voters of the state." The state canvassers, immediately after the election returns are made, shall make and *publish* an official statement of said vote; and if it shall appear from such official statement, that a majority of the votes cast as aforesaid, upon said question of prohibition, shall be for the prohibitory liquor law, then this act shall take effect on the first day of July, 1855." The act further provides, that "those portions of this act having relation to the election provided for in this section, shall take effect from and after its publication in the Iowa Capital Reporter, and the Iowa Republican." One portion is to become a law, when published in these newspapers; but this is confined to the portion contained in the section providing for the election. What event will give vitality to the remainder of the act? Is it a publication of any kind? No! That depends on several events; one is, that a majority of the votes are cast for prohibition; then, after the return is made, the canvassers are to *publish the vote*, not the law; and the act is to take effect on the first of July, if the majority of the votes are for prohibition; not otherwise. The legislature, instead of making the law themselves, delegate the power to the people, "submit the question of prohibition to the voters;" they neither make the law, nor provide for, nor authorize its publication. It may be contended, that, as the act was published in the Reporter and Republican, that it did take effect, but the act in terms forbids this construction; it is only one section that is thus to take effect. It makes the balance of the act take effect

on the contingency, that it shall appear from the publication of the canvassers, that the prohibition vote was the majority. The constitution recognizes no such contingency, no such power. The constitution (article 3, section 27) provides, that "no law of the General Assembly, of a public nature, shall take effect, until the same be published and circulated in the several counties of this state, by authority." This act is a much wider departure from the constitution, than the act declared unconstitutional, at the last term, above referred to. In that case, the governor was to publish the laws; but in this case, part of the act is to take effect by publication, and the other part, by a publication of the vote. The legislature, in the one case, undertake to make the laws themselves, and let out the job of publication to the governor; in the other, they let out the job of making the law to the people, and publish a part of the act; and as to the remainder, they dispense with the constitutional provision for publishing and circulating in the several counties in the state, by authority, and provide a new substitute in its stead. The act is not silent; it speaks for itself; it shows when and how it is to be made, and when and how it is to take effect. The substitute they had no more power to adopt, than to provide that the governor, at his discretion, might publish the laws. They had no more right to delegate the authority in the one case, or to deviate from the constitutional mode of making the laws in the other, than the makers of the Code had, to authorize the District Court, with the consent of parties, to appoint a special judge for the trial of a particular case.

The practice of submitting laws to a vote of the people, has been repeatedly declared unconstitutional, by several of the most respectable courts in the Union. *Rice v. Foster*, 4 Harrington (Delaware), 477; *Parker v. The Commonwealth*, 6 Barr, 509; *Barto v. Himrod et al.*, 4 Selden, 483. In the latter case, the Court of Appeals of New York, declared the school law unconstitutional, for the reason that it was submitted to a vote of the people, and that the legislature had not the power to delegate their authority in this manner. The Supreme Court of New York had, on several occasions

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before, made a similar decision, but the decision of the Court of Appeals, being that of the highest court in the state, is conclusive on the subject. Suppose the governor should undertake to delegate the pardoning power to a notary public; or that the Supreme Court should authorize a justice of the peace, or three justices, to hold the Supreme Court; or suppose the District Court should authorize a vote of the people of the county to be taken in a chancery or a murder case, and should direct the clerk to enter judgment, to take effect on the first day of July, provided that the canvassers should publish the vote, and a majority of the people should find the defendant guilty, or in the chancery case, should decree for the complainant. Would not every lawyer be shocked? Who would have any confidence, or feel any security? Where would our notions of constitutional law be then? What use for a constitution? Governors, legislators, and judges are selected because of their learning, ability, and responsibility to those whom they serve. They can neither of them dodge, shirk from, or shift the responsibility, in whole, or in part, upon anybody else.

An act of the legislature, is an entire thing: as such, it should have one object and one publication, and should take effect at the same time in all of its parts. One part cannot be made and published by the legislature in the usual way, and another part left to the people, the voters, and canvassers, &c. The old maxim, that too many cooks spoil the broth, is rather homely, but is quite applicable in this case. If a man should employ a surgeon to amputate a limb, such surgeon would have no right, after the job was partly done, to let out the balance to a butcher. The constitution provides that a person accused of an offence, shall have the assistance of *counsel*; in such a case, the court could not appoint a doctor or a preacher to defend the criminal, instead of *counsel* learned in the law. The entire law should be the workmanship of one hand; the legislature should attend to its own business. The members are selected on account of, and paid for, their skill. They cannot receive two dollars a day, and let out the work to irresponsible jour.

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neymen, who get nothing, and have no skill or knowledge of the business,—many of whom would be voting a law into existence, which they could not read in print.

The defendant is held to answer for selling in violation of the law, and his liquors have been seized and destroyed; consequently, the selling and seizure clauses are necessarily involved in the case; and, first, we will proceed to examine the seizure clause. Section 9 provides for a justice of the peace issuing a warrant, upon the information of three residents of the county, for the seizure of liquor. The information is not to be upon the knowledge of the informants, but on their belief, "that any intoxicating liquor, described as particularly as may be in said information, is in said county, in any place, described as particularly as may be in said information, owned or kept by any person named or described in said information, as particularly as may be." Upon the filing of the information, the justice is to issue a warrant, "directed to any peace officer in said county, describing, as particularly as may be, the liquor, and the place described in said information, and the person named or described in said information as the owner or keeper of said liquor, and commanding said officer to search thoroughly said place, and to seize the said liquor, with the vessel containing it, and to keep the same securely until final action be had thereon." Section 8 of the first article of the constitution of Iowa, provides, that "the right of the people to be secure in their persons, houses, papers, and effects, against unwarrantable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the papers and things to be seized."

Now, the above section of the liquor law, clearly violates this provision of the bill of rights. The bill of rights requires that the thing to be seized, and the place to be searched, be particularly described; whereas the act only requires that they be as particularly described as may be, meaning that the persons may give such information as they have. It is not required by the law, that it shall ap-

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pear that the amount or value of the liquor shall be within the jurisdiction of the justice of the peace; nor is it necessary that the warrant should name the person who is the owner, or whose premises are to be searched, but it may either name him, or describe him, as particularly as may be, or it may describe the keeper of the liquor,—the law is in the alternative; consequently, the person making the complaint, and the justice who issues the warrant, may, at their option, name the person who is the owner, or they may describe him, or they may describe him as particularly as may be, saying that they have no particular means of describing him. Or, if they do not choose to do this, they may name, describe, or excuse themselves from describing, and say they describe as particularly as may be, the person who is the keeper, and omit the owner altogether, even though he might be well known to all parties. There are no alternatives or may-bes in the constitution; but its language is,—“And no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the papers and things to be seized,” a positive command that it shall not be issued upon any pretence, apology, or excuse, for want of a description, but the place and thing shall be particularly described.

The eleventh article of the constitution of Iowa, section 1, limits the jurisdiction of justices of the peace, to one hundred dollars. The liquor law authorizes the seizure of liquor to an indefinite amount, and the justice is authorized, without notifying the owner, by merely posting up a notice at the place where it was seized, to pronounce judgment of forfeiture, and to issue an execution, commanding the officer to destroy liquor to any amount. Let us suppose a practical case under this law: A warehouseman, in Davenport or Dubuque, might receive a cargo of liquors, shipped from New York to Minnesota. These liquors might be owned by twenty or fifty different merchants, county agents, &c., of Minnesota, and may be of the value of fifteen or twenty thousand dollars. Some three individuals in the community, who have an appetite for destroying liquor, file an informa-

tion before a justice of the peace, describing the keeper of the liquors, as the law calls him, as particularly as may be; not knowing much about him, however. The justice issues his warrant, describing him, in the same manner; the liquors are seized; and the next step, by the express terms of the act, contained in section 10, is, that the justice "shall within forty-eight hours after such seizure, cause to be left at the place where said liquor was seized, if said place be a dwelling-house, store, or shop, posted in some conspicuous place on or about said buildings, and also to be left with, or at the last known and usual place of residence of the person named or described in said information, as the owner or keeper of said liquor, if he be a resident of this state, a notice summoning such person, and all others whom it may concern, to appear before said justice, at a place and time named in said notice (which time shall not be less than five, nor more than fifteen, days after the posting and leaving of said notices), and show cause, if any they have, why said liquor, together with the vessel in which the same is contained, should not be forfeited." The court will perceive, that this is not required in such a case as we have supposed, that is, where the owners or the keepers should happen to be non-residents of the state; nor is any notice required to be posted up, unless the place is a store or dwelling-house, or shop; if they should be found in a warehouse, or a steamboat, or upon the levee, or in a railroad car, no notice whatever is required, of any kind, to any person, nor any pretence of notice.

Section 10, further provides, "that whether any person shall so appear or not, said justice shall, at the prescribed time, proceed to the trial of said case, and said complainants, or either of them, may, and upon their default, the officer having such liquor in custody shall, appear before said justice, and prosecute said information, and show cause why such liquor should be adjudged forfeited." It will be seen by this, that the justice may, without any notice whatever, or by merely constructive notice, if the liquor should be found in a dwelling-house, store, or shop, proceed in the trial; and

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that the accusers may appear or not, as may best suit them. It entirely deprives the defendant of the opportunity of being confronted with the witnesses against him, as provided in the tenth section of the article of the bill of rights. The same section authorizes the justice to pronounce judgment that the said liquors be forfeited. Section 11, provides, that "whenever it shall be finally decided that liquor seized as aforesaid, is forfeited, the justice of the peace, or other court rendering final judgment of forfeiture, shall issue to the officer having said liquor in custody, or to some other peace officer, a written order, directing him forthwith to destroy said liquor, and the vessels containing the same, and immediately thereafter to make return of said order to the court whence issued, with his doings indorsed thereon, which return shall in all cases be sworn to." Here is a judgment entered against a man in his absence. Probably the property of twenty men would be destroyed, who live in another state, without their knowledge or consent, and without even a constructive notice; for no such notice is required, unless the liquor be found in a dwelling-house, store, or shop, and even then, it would only be a constructive notice, by posting. The persons, as owners or as keepers of the liquor—the liquor to be seized—and the place where it is to be seized—need not be particularly described; but the owner may be named, or the keeper may be named, or either of them may be described, if they can be; and if they cannot be particularly described, as the constitution requires, then they may be described, either of them, as particularly as may be; and even though they are described, no notice of any kind is necessary, unless the liquor be found within a house, store, or shop. The mode of destroying the liquor, is not particularly specified, but the practical mode of destroying it, it is presumed, would not be unusual, nor would it be a departure from wonted custom. In most cases, it would probably be made to flow in the customary channels, unless some of it should be diverted for mechanical or medicinal purposes. But it may be said, that all this cannot be done, without some proof. But we ask, where the party has no notice, and where

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no notice is required, has the defendant an opportunity of being confronted with the witnesses who may swear? Are the accusers required to be present? They certainly are not. If neither they, nor either of them appear, the act provides that the officer shall prosecute, and if any swearing were necessary, he could do it himself.

Section 7 provides: "And upon the trial of every indictment or information for violations of the provisions of this section, proof of the finding of the liquor named in the indictment or information, in the possession of the accused, in any place, except his private dwelling-house, or its dependencies (or in such dwelling-house or dependencies, if the same be a tavern, public eating-house, grocery, or other place of public resort), shall be received and acted upon by the court, as presumptive evidence that such liquor was kept or held for sale, contrary to the provisions of this act." Here, then, is a plain direction of the statute, that the bare finding of liquor in any place, except in a dwelling-house or its dependencies, shall be evidence of an intent to violate the act; consequently, all the officer would have to do, would be to swear that he found the liquors, and *that* would be presumptive evidence of guilt. No proof is required of the intent to sell. If a man should go to the county agent, and should buy liquor for mechanical or medicinal purposes, and an officer should seize it in his wagon, while it was standing in the street, and the owner was attending to his business in town, the finding in the wagon, would be evidence that he intended to sell it, in violation of the act. Or, if he kept a boarding-house, or a tavern, or an eating-house, the bare fact of finding liquor, no matter in how small a quantity, would be evidence that he intended to sell it, in violation of the act. If the owner should happen to be absent from home, or should be sick, or should not happen to see the notice that was posted up; or if it should be found in any place except his house, no notice would be necessary; a judgment of forfeiture might be pronounced against liquors bought and kept for medicinal or mechanical purposes.

An officer would have a right to go into a church, for a

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church is not a dwelling-house, and seize upon liquors found in the church, although they might be intended for sacramental purposes. Or the officer might go into a shop, where they were kept and intended for mechanical purposes only. If a man keeps a boarding-house or a tavern, he cannot have enough of the article in his house to replenish his camphor, without subjecting his house to be declared a nuisance, and not only subjecting his house to be demolished, but the ground on which it stands. The eighth section provides, that, "in case of violation of the provisions of either of the three preceding sections, the building or erection of whatever kind, or the ground itself, in or upon which such unlawful sale or manufacture, or keeping with intent to sell, of any intoxicating liquor, is carried on, or continued, or exists, is hereby declared a nuisance, and may be abated as the law provides." We think this is a most extraordinary law; it goes entirely beyond all the other liquor laws. The furious, unheard of consequences, which are to be visited in the shape of fines, upon the defendant himself; the destruction of his houses, and even the ground upon which they stand; the forfeiture of his liquor; he to be branded as a criminal, to be outlawed, and tried without any notice or hearing, as he may be under the provisions of this act; the vesting of justices of the peace with jurisdiction to an unlimited amount of property in value, with power to destroy, to declare forfeited, &c.; are all entirely unprecedented, and without any warrant of authority, under the constitution of Iowa. It is not very hard to imagine how a constable, attended by a *posse comitatus*, might destroy a few barrels of good liquor; nor would it be very difficult to imagine how they might go to work, after they had destroyed a sufficient quantity of the liquor, and destroy the house; but when it comes to abating the ground, we cannot conceive how this could be done, unless it might be considered as constructively done, as land and real property could have no value in a country, where such ridiculous proceedings were allowed, and such an utter and total disregard of property sanctioned. A regular trial, such as is contemplated by the constitution, means that a

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party shall be entitled to the presumption of being innocent, until he is proved to be guilty, according to the time-honored and immemorial usages of the common law; and a statute which completely overturns this principle, is a plain violation of the constitution. "Due process of law," means a regular trial throughout.

This act goes beyond all other similar laws, in nearly all of its provisions. Other liquor laws provide that "pure wine may be sold for sacramental purposes;" but our act provides for the appointment of an agent or agents of each county, for the purchase of *intoxicating liquor*, and for the sale thereof within such county, for medicinal, mechanical, and *sacramental* purposes only. It is "intoxicating liquor"—that which will really "make drunk"—which is to be used for sacramental purposes. This has been interpreted by some of the county agents, to mean whiskey, which is supposed to be about as "intoxicating" as any other liquor. This provision, together with the provision concerning the abatement of the ground, and the proceeding against persons, without any notice; the provision for describing persons and things, only as particularly as may be, instead of describing them as the constitution directs; the provision making the bare finding in any place, except a dwelling-house, evidence of an intent to sell—all concur in stamping the act as being anything but the work of wise legislators.

Story on the Constitution (second edition), 1901, states the provisions of the constitution against unreasonable searches and seizures. In section 1902, referring to that provision, he says: "This provision seems indispensable to the free enjoyment of the rights of personal security, personal liberty, and private property. It is little more than the affirmance of a great constitutional doctrine of the common law. And its introduction into the amendments, was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants, almost upon the eve of the American Revolution." He then goes on to show the history and cause of general warrants, instead of special warrants, particularly and specifically de-

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scribing the persons and things to be seized; that a contrary practice had been indulged in; general warrants had been issued; and he adds: "The general warrant, so issued, in general terms authorized the officers to apprehend all persons suspected, without naming or describing any person in special. In the year 1763, the legality of these warrants was brought before the King's Bench for solemn discussion; and they were adjudged to be illegal and void for uncertainty." *Morey v. Leach*, 3 Burr. 1743. "A warrant, and the complaint on which the same is founded, to be legal, must not only state the name of the party, but also the time and place, and nature of the offence, with reasonable certainty." The learned author refers, in support of this doctrine, to *Ex parte Burford*, 3 Cranch, 447. Here is a plain history of the reason that gave rise to this clause against unreasonable searches and seizures. Such warrants were declared to be illegal, even in England. To prevent such warrants from ever being considered valid, this clause was inserted in the constitution of the United States, and of the respective states. The mischief was, that warrants were issued without particularly describing the person and thing to be seized; the constitutional safeguard was inserted to prevent this. Under the old practice, they only described persons and things, as particularly as may be; they either described the owner, or if they did not please to describe him, they described somebody else; and if they did not describe that somebody else, who was the keeper, then they described matters generally, or only as particular as may be. Justice Story considers this provision as a great safeguard, necessary for the protection of liberty and property.

That particular part of our law which applies to seizures, is in the same language, probably *verbatim*, as the ninth section of the Massachusetts liquor law. Ch. J. SHAW, in his opinion in the case of *Fish v. McGirr et al.*, 1 Gray, 1, sets forth the provisions of the Massachusetts law, and the different extracts which he gives, when put together, make precisely the ninth section of our act. The chief justice pronounces the act to be unconstitutional, for the reasons that

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it provides for no sufficient notice—it gives the justice jurisdiction over an unlimited amount of property—and the person, and thing to be seized, are not to be particularly described, or at any rate, it is not necessary they should be particularly described. In the particular case before that court, the difficulties had been obviated by the justice naming a person in his warrant, and by giving regular notice to the party; but it was the unanimous opinion of the whole court, that the act was unconstitutional and void; and that an unconstitutional and void act, could not be patched up and made valid by a justice. They would look at the act, and see whether on its face, it was valid; and if the law did not require the justice to particularly describe and name the person and thing to be seized, and if it did not require a notice, the law would be unconstitutional, though the justice should patch it up, and give names, notices, &c. The proceeding, the warrant, the complaint, are the superstructure, and the law is the basis. If this basis is unsound, as a matter of course, the superstructure cannot be secure; if the basis is void and unconstitutional, the superstructure is a nullity; and it matters not how artfully and exactly the proceeding may be framed, it must rest upon a constitutional law to be valid. CH. J. SHAW says: "It appears to us, therefore, that this act, in terms, warrants and requires unreasonable searches and seizures, and is, therefore, contrary to the constitution. If it be said, that the act provides for as much certainty in the description of the articles to be searched for and seized, and in the description and limitation of the officer's power, as the nature of the case will admit of; that the complainants cannot know with certainty, before the search is made, that spirits are deposited in the place described, or are intended for sale, and can only state their belief; that neither the complainants, nor the magistrate, can know, before search, who is the owner, or has the custody, or intends to sell, and, therefore, cannot name him; and that it is impossible for the complainants, or for the searching officer, to distinguish what part of the liquors found is intended for sale, and that, must be a subject of inquiry

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before the magistrate afterwards; the answer seems to us to be obvious, that if these modes of accomplishing a laudable purpose, and of carrying into effect a good and wholesome law, cannot be pursued without a violation of the constitution, they cannot be pursued at all, and other means must be devised, not open to such objections."

Again: under our law, or the Massachusetts one, which, in this respect, is precisely like it, imported liquors, which are expressly protected by the act of Congress in the transit to the point of destination, might be seized. For instance, a cargo of imported liquors might be deposited in a warehouse in Iowa, for reshipment to St. Paul, where the importer resides; or if you please, to an importer who resides in Iowa, and who has a perfect right, under the laws of Congress, to buy these liquors. While the cargo remained in the warehouse, any three persons might make complaint, not that there were such liquors there, but that they believed there were, and cause the same to be seized. For this cause, the Supreme Court of Massachusetts held the law to be unconstitutional; they say: "Another ground is, that if, upon a complaint that some liquors are kept in a warehouse or on board a vessel, believed to be intended for sale, a warrant shall go, and the officer is obliged to seize all the liquors found in the same store or vessel—and such is the plain direction of the statute—then the officers must seize such liquors, though imported, and remaining in the original packages, (a cargo of wine and brandy, for instance,) and bring them before a magistrate. This would be an interference with the regulation of foreign commerce, placed under the exclusive jurisdiction of the constitution and laws of the United States. And though there is a provision in this act, that the owner of such imported liquors may go before the magistrate and obtain their release, by proof of the facts, yet such seizure and detention, perhaps for a long period, would be in danger of bringing this power into conflict with the laws of the United States, which, within their proper sphere, are the supreme law of the land."

The court, after enumerating four constitutional objec-

tions, either one of which made the seizure part of the act entirely null and void, proceeded as follows: "Another ground, upon which we are of opinion, that this section of the act is unconstitutional, is, that in the commencement and course of proceedings, required and directed by the series of measures provided for in the act, many of the precautions and safeguards for the security of persons and property, and the most valuable rights of the subjects, so sedulously required and insisted on in the laws of all well ordered governments, and especially prescribed as the governing rule of the legislature, in our declaration of rights, are overlooked and disregarded." Then the chief justice quotes from the bill of rights of Massachusetts, as follows: "All men have certain natural, essential, and inalienable rights, among others, that of acquiring, possessing, and protecting property." He proceeds to discuss the meaning of this section of the bill of rights, and shows clearly, that such a law prevents a man from acquiring, possessing, and protecting his property, and is consequently null and void. The same provision *verbatim*, is found in the bill of rights of the constitution of Iowa. As a matter of history, we all know that Massachusetts was the first state that adopted a constitution with a bill of rights; and that these bills of rights, wherever they have been adopted in other states, have generally been copied from Massachusetts. The very first words in the bill of rights of the constitution of Massachusetts, declare that all men are born free and equal. That constitution was adopted before the constitution of the United States was adopted, and immediately after the revolution, and it yet remains the constitution of Massachusetts, with very few amendments. Shortly after the adoption of this constitution, the question arose in Massachusetts, whether slavery could exist, compatible with this declaration of the bill of rights, and the Supreme Court decided that it could not. The consequence was, that when the federal convention met to adopt the constitution of the United States, everything that had the slightest squinting towards a bill of rights, was looked upon with great suspicion, and the constitution, as

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adopted, contained no bill of rights. The constitution of the United States, therefore, is not as broad in its terms as most of the state constitutions. The first constitution of Massachusetts that was proposed, was proposed without a bill of rights, and was voted down, because it had none. See 3 Hildreth's History of the U. S., 375 and 391. At that time, the right to drink tea, the right to drink and to sell whiskey, the right of every man to enjoy his own opinions with regard to religious matters, were deemed among the most sacred rights. Liquors of all kinds had been an article of commerce, and used, and recognized as property, long before. The date of this right, was coeval with the history of the common law. See Jacob's Law Dictionary, title Wine.

Shortly after the adoption of the constitution of Massachusetts, Shae's rebellion broke out, and the government of the United States was compelled to interfere, and send an army to put it down. The rebels were dealt with by the local authorities, and disfranchised; "they took from them the right to vote, to be jurymen, schoolmasters, innkeepers, or the retailers of spirituous liquors." 3 Hildreth's Hist. of U. S., 476. This shows that a man who was to be deprived of the privilege of selling liquors, was to be considered as disfranchised; it was a punishment to be visited upon rebels, for raising a rebellion against their country. Who will undertake to say now, that the whole community shall be considered as rebels? That they will take from them, not only the privilege of being retailers of spirituous liquors, but shall take from them the privilege of acquiring it, of possessing, of protecting it, or of using it. This clause in the bill of rights, in relation to acquiring, possessing, and protecting property, had reference to property as it then existed. In fact, there are more than twenty decisions, promulgated within the last three years, which pronounce liquor to be property. It was, at the time of the adoption of the constitution of Iowa, Massachusetts, and the other states, considered such. The star of temperance had not, at that time, dawned upon the people; although in the constitution of

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Massachusetts, temperance is recognized as a fundamental virtue. The theory in those days was, that the people were allowed to practice temperance, and this was allowed as a privilege. The theory now is, that instead of being allowed to practice temperance, they are to be prohibited from it; and abstinence, teetotal, is substituted in its stead. The right to acquire, to possess, or to protect, is to be taken away. Hamilton and Madison, in the *Federalist*, in speaking of the ways and means of the government to raise revenue, speak of duties being levied on spirituous liquors, as being on a kind of property that might be made subject to such imports; but nobody dreamed, at that time, of such a thing as prohibiting a man from acquiring, possessing, or protecting it. Congress, at a very early day, did lay a duty upon whiskey, which caused one of the most formidable rebellions that was ever known in the Union; which was general in western Pennsylvania; and caused a great deal of bloodshed, and the destruction of vast quantities of property. Houses and barns, and stills, were burned down and destroyed; and the United States were compelled, not only to modify the law again and again, but in the end, to call out the powers of the United States to put down the rebellion. We are not aware that any attempt has since been made to levy a duty upon domestic liquors, by the United States. A full history of the rebellion may be found in the *Western Annals*, page 472 *et seq.* It appears upon that page, that Albert Gallatin, who was afterwards a very distinguished member of the cabinet of the United States—that the judges and members of the legislature of Pennsylvania, and the ministers of the gospel—all joined in with the people in raising this rebellion, and that Albert Gallatin actually presided at one of their meetings. The law was fiercely pronounced to be an invasion of the rights of the people. Now, we think that they were wrong, and that the United States had a right to levy a tax; but we refer to this, for the purpose of showing that in early days, liquor, like tea, was one of those things that was regarded as sacred; and even the

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present liquor law, seems to regard whiskey as suitable for sacramental purposes.

Chief Justice SHAW, in his opinion, before referred to, speaking of liquor, calls it property in numerous passages, and as such, holds that it must be protected. This decision is a very able one; it was pronounced by five learned judges as the unanimous opinion of the court, which adds much to its value. The Supreme Court of Indiana, in the late case of *The State v. Beebe*, reported in the newspapers, had a question somewhat different from the question submitted in Massachusetts. It was, as to the constitutionality of that part of the law which creates the county agency, and that part which refers to the manufacture of liquor. The court say expressly, that they pronounce no opinion, either one way or the other, as to the seizure clause—that that is not before them. Three of the judges held, that the agency clause, and that clause which prohibited the making of liquor, were unconstitutional, null and void; and the defendant was discharged. The three judges who concurred in discharging the defendant, on account of the act being unconstitutional and void, arrived at their conclusion by somewhat different processes of reasoning; and the fourth judge entirely dissented, and held that the act, in all respects, was constitutional and valid. The opinion of Judge PERKINS is quite short, and to the point. We quote it nearly entire; and will also quote an extract from the opinion of Judge STUART, which opinion is very long.

Judge PERKINS says: "The law absolutely forbids the people of the state to manufacture and sell whiskey, ale, porter, and beer, as a beverage, or at all, except for the government, to be sold by it for medicine, &c., and it prohibits, absolutely, the use of all these articles by the people as a beverage. It is not competent for the government to monopolize the business of making and selling liquor as a medicine, since that is, and has been, a private pursuit of the people. This is not such a business that a private citizen cannot engage in. The maxim that '*The safety of the*

people, is the supreme law,' does not apply to our form of government, but written constitutions stand in its stead.

"It does not prove the power of the state legislature to enact the law in question, to show, that the Supreme Court of the United States has decided, that it cannot decide such state law inoperative; for that court can only decide void, such state laws as conflict with the restrictions placed upon state power by the constitution of the United States; and if, in that constitution, the states are not restrained from passing laws in violation of the natural rights of citizens, the Supreme Court of the United States cannot act upon such laws when passed, because they do not fall within its jurisdiction. But it does not follow, because the constitution of the United States does not prohibit state legislation infringing the natural rights of the citizen, such legislation is valid. The constitution of the United States may not, but that of the state may, inhibit it. The powers conferred on the legislature by our state constitution, have never been passed upon by the Supreme Court of the United States.

"By the first section of the first article of the state constitution, it is set forth that 'all men are endowed by their creator with certain inalienable rights, and that among those are life, liberty, and the pursuit of happiness.' The people have thus expressly reserved the right of property and its enjoyment, in forming their constitution, from the unlimited power of the legislature; and further, to guard the right, have declared that it shall not be taken from them, without just compensation, nor be injured without a remedy therefor by due process of law, nor be subject to unreasonable seizure, &c. Under these provisions, the legislature cannot take the property—the liquors of a single individual, if they are property—when not needed for public purposes, and then only, upon compensation; liquor is property; so are distilleries, in this state. They have always been held and taxed as property, and are of large value.

"Section 22, article 1, of the constitution, is as follows: 'The privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting

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a reasonable amount of property from seizure or sale, for the payment of any debt or liability hereafter contracted.' This constitutional provision would be of no avail, in case the property of the debtor consisted entirely of liquor, if the government could step in at will, and confiscate that property. This law also conflicts with another provision of the constitution, which declares that no law shall be passed impairing the obligation of contracts. The legislature cannot enlarge its power over property or pursuits, by declaring them nuisances, or by enacting a definition of a nuisance that will cover them. It is the province of the judiciary to ascertain and determine what nuisances are. Legislative discretion in the passage of laws, is a proper subject of the review and control of the judiciary, where constitutional provisions are infringed.

"The powers of Congress, under the constitution of the United States, and those of the legislature, under the state constitution, are not parallel, for in the constitution of the United States there is no bill of rights; nothing limiting Congress in its action as to commerce; while in the state constitution, there is a bill of rights, containing certain restrictions upon the legislative power, certain sections declaring rights in the citizen as against the government; and those restrictions operate just as potently upon the power of the legislature to regulate commerce, as to do anything else, and prevent that body just as effectually, from infringing the reserved rights by assumed regulations of commerce, as by any direct enactment. The court knows, and is capable of judicially asserting the fact, that the use of beer and liquor as a beverage, is not necessarily hurtful, any more than the use of lemonade or ice cream. It is their abuse, and not their use, that is hurtful. The legislature, in assuming that the manufacture and sale of these articles were not necessary to the community, and in acting upon that assumption, has unwarrantably invaded the right of private property, and its use as a beverage and article of traffic. For these reasons, the act is held to be void. The judgment should be reversed, and the prisoner discharged."

Judge STUART says : "It is proper to add, what was announced in the outset, that the details of the law, are not before us ; and the opinion is not to be regarded as covering the search and seizure clause. It is confined wholly to the question before us—the power of the legislature to restrain the sale and use. I am, therefore, of opinion, that it was competent for the legislature to restrain the use and sale of intoxicating liquor. But that so much of the act as relates to the manufacture and agency, are unconstitutional and void ; but I do not put it on the ground assumed by Judge PERKINS. What the practical effect of this ruling will be, it is not for me to say. The intent with which the liquor was sold in each particular case—whether incident to the right to manufacture, or otherwise—will always be a question for the jury. It presents similar difficulties to those in *Brown v. Maryland*, 12 Wheat. 419. The court will have to settle it on analogous principles. The case of manufacturing, should be reversed, and Beebe discharged on the merits."

It is proper to remark, that in this Indiana case, while one of the counsel, Judge OTTO, was arguing, Judge STUART stopped him, and reminded him, that the clause in the bill of rights, declaring the inalienable right of acquiring, possessing, and protecting property, which was contained in the constitution of 1816, had been omitted in the constitution of 1851. Thus showing that in Indiana, the constitution is different from the constitutions of Massachusetts or Iowa ; and Judge STUART, in delivering his opinion, makes an express reference to this difference. Therefore, any reasoning thrown out by any of the judges upon the prohibition against selling, would not apply to the case now before the court.

The particular fact in each case quoted, and the points that were really before the court, should always be kept in view, in the examination of decisions. The cases referred to in 5 Howard, 504, were not cases involving any question in relation to prohibitory liquor laws. They were license questions, where persons had been selling without licences,

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though licences might have been taken out. The only question in those cases was, whether the different laws of these states, regulating the mode of licensing, were contrary to the acts of Congress for the regulation of commerce. The Supreme Court of the United States, under the 25th section of the judiciary act, have no jurisdiction to inquire whether state laws contravene the principles of the state constitutions; but that court is confined to the simple question, whether the particular act is contrary to the constitution of the United States, or the acts of Congress. See *Jackson v. Lamphere*, 3 Peters, 280; *McBride v. Hoey*, 11 Peters, 167. The Supreme Court of the United States, in this respect, is a court of limited jurisdiction. The object of the 25th section of the judiciary act, in allowing writs of error to the highest decision of a state court, wherein is drawn in question the validity of a state law, on the ground of its repugnance to the constitution of the United States, is to prevent the states from undermining the federal government, by passing laws which will contravene the constitution of the United States, treaties, or acts of Congress. When a case is made, it goes up specifically on the ground, that a certain clause of the constitution, or certain act of Congress under it, is violated; and the Supreme Court in its decision, is strictly confined to the particular point, and will make no inquiry as to any other. See *Pottards' Lessee v. Kibbe*, 14 Peters, 353; *Law's United States Courts, &c.* 123. Consequently, the only point involved in the cases in 5 Howard, was, whether the acts were contrary to the acts of Congress regulating commerce, and any dicta that the court may have thrown out beyond that, would go for nothing. When the court say that the states may pass laws having certain effects, without contravening the acts of Congress, they do not therefore undertake to say, that there might be nothing in the state constitutions which would prevent the passage of such laws; nor do they say, that if such a law as our law was passed, and the question should be raised, whether it was not a violation of the constitution of the United States, with regard to unlawful searches and seizures, that

they would declare that it was not. The state courts alone have power to declare laws unconstitutional, for the reason that they are opposed to the principles of the state constitutions. The Supreme Court of New York, at the July term, 1855, decided the liquor law of New York to be unconstitutional, in those provisions which prohibited the sale of liquors. Judge BROWN, who delivered the opinion of the court, maintained that liquor is property, in the fullest sense of the word, and that the legislature has no power to deprive it of the rights which appertain to property in general, and therefore no right to forbid its sale. Nor has it any right to interfere with the right of legal action for the protection of property, or deprive liquor of any of the defences with which the constitution surrounds private property, by declaring it a nuisance. He examines the various opinions given by the justices of the Supreme Court of the United States, to show that the right to import liquor, which is conferred by Congress, carries with it the right to sell; and infers that the legislature has no right to forbid the sale of liquors imported under United States laws.

He concludes: "I therefore arrive at the conclusion, that so much of the first section of the act under consideration, as declares that intoxicating liquors shall not be sold or kept for sale, or with intent to be sold, except by the persons and for the special uses mentioned in this act; so much of the sections 6, 7, 10, and 12, as provides for its seizure, for forfeiture and destruction; so much of the 16th section as declares that no person shall maintain an action, to recover the value of any liquor sold or kept by him, which shall be purchased, taken, detained, or injured, unless he proves the same was sold according to the provisions of the act, or was lawfully kept and owned by him; so much of section 17 as declares that upon the trial of any complaint under the act, proof of delivery shall be proof of sale, and proof of sale, shall be sufficient to sustain an averment of unlawful sale; and so much of section 25 as declares that intoxicating liquor, kept in violation of any provision of the act, shall be deemed to be a public nuisance, are repugnant to the provis-

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ions of the constitution for the protection of liberty and property, and absolutely void." Livingston's Law Mag. Oct. 1855, 619. In the same case, Judge STRONG is reported to have said: "Property must be protected by law, and that too, without reference to its greater or less utility. The duty of protection extends to whatever has been held and enjoyed as property, by custom and the usages of the country. No power is given to any man or body of men to discriminate. The only attempt that has ever been made in this state, to legislate any species of property out of existence, was in the case of slavery, and there, slaves were not property at common law. The power of alienation is an essential incident to the right of property; and though the manner of selling may be regulated, the right to sell cannot be destroyed. That intoxicating liquors are, and always have been, property at common law, is clear. Imported liquors are expressly recognized as property by law, and whether the state can lawfully prohibit the manufacture of domestic liquors or not, after they have been manufactured, they are evidently property." Upon this point, the judge arrives at the following conclusion: "I consider the statute in question, as mainly prohibiting the sale of intoxicating liquors as a beverage, and destructive of its principal value; and with that impression, I must adjudge it to be null and void to that extent." Thus, two judges, out of three, held the law to be clearly unconstitutional—Judge ROCKWELL maintaining the contrary.

It will be seen from the language of the foregoing extracts, and in fact from that of nearly all the opinions from which we quote, that liquor is constantly recognized as property, and treated as such. The Supreme Court of the United States call it property, and admit it to be such. The courts of Maine have repeatedly decided, that it is property, and that an action might be maintained to recover it, notwithstanding the Maine liquor law declared that no such action could be maintained. The Supreme Court of Massachusetts in the case in 1 Gray, before referred to, call it property, and say that it must be protected as such. The term prop-

erty, in that decision, is applied to it a great number of times. Then if it is property, is there any distinction in the constitution between it and other property? Has not the citizen the same right to acquire, possess, and protect this, that he has any other property? If there is a distinction, in what does it consist? As to whether the provisions of the constitution, allowing citizens to acquire, protect, and possess, are wise or not, is a question with which this court has nothing to do. It may be bad policy to have a bill of rights at all. It may be bad policy to adopt such language as is contained in this particular sentence. But if so, it is no part of the business of this court, to strike out these objectionable features from the constitution. The right of acquiring, necessarily includes the right of purchase; and the right of purchase, necessarily pre-supposes the right to sell, and the right of possessing and protecting. The exercise of the right of possessing this species of property, either in an out-house, store, or tavern, is only the exercise of a plain constitutional right.—It is not in the power of the legislature to say, that the mere simple act of possessing, protecting, and holding property in this way, is a crime.

The bare exercise of the constitutional right of possessing, is, by the express terms of the liquor law, declared to be a crime; to be evidence of an intent to sell, which subjects the possessor to the penalty of forfeiture of the particular property seized, to a fine of twenty dollars, to be sent to jail for thirty days, to a destruction of his house, and an abatement of the ground on which it stands. Tea would, undoubtedly, be considered property by the constitution. If so, a citizen has a right to acquire it by purchase, to possess it, and to protect it. Now suppose the legislature should enact a tea law, that would forbid the selling, the possessing, and the protecting of tea; suppose they should declare that if a man did possess it, and it was found in his possession, that it should be evidence of an intent to sell tea, contrary to the provisions of the act; and suppose they should declare that the owner of tea would not be allowed to protect it; but that it might be seized and destroyed. Could any

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one imagine an act, that would be more directly and diametrically opposed to the exact words of the constitution. The one says, they may acquire, they may possess, they may protect; and the other says, they shall not sell, shall not possess, shall not protect; and that if they do possess the article, that shall be evidence of an intent to commit a crime, the article shall be forfeited, the possessor be fined twenty dollars, and be sent to the jail for thirty days, his house be demolished and the ground be abated on which it stands; and this be no violation of the constitution. Then, if that much should be established as to tea, the next question would be whether coffee was not quite as pernicious, and should not be treated in the same way. And tobacco could not be excused, after proceeding thus far; and then there are various kinds of food, that are held to be hard of digestion, not very nutritious, and generally injurious to health; perhaps some kinds possess too much of the stimulus; all these must be added to the list. And finally, if one kind of property may be treated in this way, any kind may. The constitution says, that a person may acquire, possess, and protect, but the law says he shall do neither; and if he do those very things which the constitution says he may, that exercise of the constitutional right, shall, of itself, furnish evidence of an intent to commit a crime.

The constitution is the anchor of the state; it is a sort of compact entered into by the crew, when they go on board, by which they agree that there shall be no mutiny—that the rights of individuals and of minorities shall be protected, against the acts of the majority; that their private property and private liberty shall be secure. In popular governments, the mutability of the law, is a marked characteristic. Change, change, change, is the order of legislation. Every new set of legislators that are sent up to make laws, generally wipe out all that was done by their predecessors, and enact a new code of laws, no better than those they repeal. The use of a fundamental law—a constitution—an anchor to the ship of state—is, that there shall be something that has some stability; that some of the dearest rights of the citizen shall

be anchored in a manner that will give them safety; that the lives, liberty, and property of citizens shall be secure from this fluctuating, shifting, veering legislation; and whenever the courts shall cut loose from this anchor, and set the ship afloat, at the mercy of the popular view and breezes, there will be no longer any security or safety. The privileges secured by the bill of rights, should be held sacred, for these are the anchor of the law, as the law is the anchor of the republic—*judicia enim anchoræ legum sunt, ut leges republicæ.*

WOODWARD, J.—This cause arises under the act for the suppression of intemperance. All the questions of a constitutional character which are propounded in this cause, are embraced and considered in the case of *Santo et al. v. The State*, ante, 165. We will here notice those objections only which apply to this particular cause.

First. A motion was made to quash the information, because, whilst the liquor is charged as being in the house of the defendant, no affidavit of a sale at any time, is made, as is required by the act, before the warrant can issue. The act, section 9, directs that if the place to be searched be a dwelling-house in which any family resides, and in which no tavern, eating-house, grocery, or other place of public resort is kept, there shall be a more special affidavit, alleging that the liquor has been sold there. The complaint avers the liquors to be kept "in a certain house or place, known or described as being the house occupied and kept by one Cephas Sanders," on such a lot in Davenport. The counsel have devoted no words to these minor questions, and we shall be brief. The statute qualifies the proceeding, when against a "dwelling-house," or "a house in which a family resides." The complaint does not show the "house" to come within this description; nor is there a place showing it to be such. We do not think we are bound to hold the word "house" to be equivalent to "dwelling-house," especially, when the statute uses the latter term. We could not do so, under section 2608 of the Code, relating to bur-

glary, if a person were charged with breaking and entering the "house" of A.

Second. Cephas Sanders, who appeared in this cause, claiming the property and making defence, pleaded a former conviction in bar. That is, he pleaded as a bar to this complaint and prosecution, the complaint in the foregoing cause against himself, for keeping these liquors for sale. And the question is, whether *his* conviction for keeping them for sale, is a bar to this proceeding against the liquors themselves.

Let us look at the meaning of the act. First; it makes the keeping liquors for sale in the state, an offence. This is personal. Second; it makes liquors kept for sale in the state, a nuisance. Such a nuisance is to be abated by the forfeiture and destruction of the article. His conviction for keeping, does not answer the whole end and object of the law. To fine him for keeping for sale, and then leave the thing still to be sold, would be an evasion of the intent of the law. That intent is, to remove the occasion of the evil. These two objects might, perhaps, be united in one proceeding; and if they were, it would not be pretended that his conviction for keeping with intent to sell, would prevent the destruction of the thing. Why, then, should it be a bar, when the two objects are sought in separate proceedings? The act does not seem to contemplate that the liquors *must* be seized, in a proceeding against one for keeping it for sale, but evidently permits it to be pursued separately. We will not say that it *requires* it. This being correct, the conviction of the defendant for keeping with intent to sell, is not a bar to a prosecution against the liquors themselves as a nuisance, and for the abatement of the nuisance.

Third. The proposition embraced in the second point above, being correct, it follows that there was no error in the court refusing the two instructions asked upon this subject, as the basis of them is the assumption that the former conviction is a bar.

Fourth. The next error assigned is, the overruling the motion for a new trial, upon the ground that after the jury had retired, and before they returned into court with their verdict,

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two of the jurors separated from their fellows, and conversed with other persons about their verdict. The affidavit of James M. Cavanaugh, which is offered to sustain this motion, states, that after the jury retired to consider their verdict in the above cause, on Monday evening, October 1, 1855, and before they had returned their verdict into court, to wit: on the Tuesday morning following, two of the jurors—Allen and Palmer—separated from their fellows, and were in the office of the affiant, and conversed in his presence about the case—and that afterward, they were present when the verdict was presented to the court. This bears the semblance of a serious matter. But the record shows that, on the day of the trial, the parties agreed that the jury should seal up their verdict, after agreeing upon it, and return it into court on the next morning; and that on the next morning, to wit, October 2, the jury returned a written and sealed verdict. The affidavit says, that the two jurors were separate from their fellows, on Tuesday morning; and we see no fault in this, under the foregoing arrangement. The charge is, that they conversed with *other* persons; but the affidavit says, they conversed in his (affiant's) *presence* about the case. It does not show that they conversed with another, nor that another person conversed with them. There is no error here.

Throughout these causes, the court has been solicitous not to avoid any question which might fairly be considered as presented; and it is possible that some have been considered which are not properly before us. It is to be regretted that the records are so often in an imperfect or irregular condition. This record shows us no affidavit of appeal; and papers are referred to as exhibits "A." and "B.," &c., whilst no such papers are recognized in the case. With this remark, we pass certain other and lesser questions, believing that all the essential ones are considered.

The judgment of the District Court is affirmed.

The State of Iowa ex rel. Weir v. The County Judge of Davis County.

THE STATE OF IOWA *ex rel.* WEIR v. THE COUNTY JUDGE
OF DAVIS COUNTY.

The act entitled "An act in relation to certain state roads therein named," approved January 22, 1853, is constitutional.

It is the duty of the courts to give such a construction to an act, if possible, as will avoid the necessity of exercising the power of declaring an act of the legislature void, and uphold the law.

In determining whether a law is constitutional, under section twenty-six of the third article of the constitution, which declares that every law shall embrace but one object, which shall be expressed in the title, the unity of object is to be looked for in the ultimate end designed to be attained, and not in the details leading to that end.

Section 2183 of the Code, which provides that the writ of mandamus may be issued on the information, under oath, of the party beneficially interested, contemplates that either the public, through its officers, for the enforcement of a public duty, or an individual, having a right to be enforced, or an interest to be affected, may cause the writ to be issued, and not that every one who pleases may sue out the writ.

Where the petition or affidavit for a writ of mandamus, does not show any right or interest whatever in the relator, in connection with the object of the writ, the writ should not be allowed.

Appeal from the Davis District Court.

THIS was a proceeding by mandamus, by the state of Iowa, on the relation of James R. Weir, against the county judge of Davis county, to compel the opening of a certain state road. The petition alleges that an act of the General Assembly, of 22d of January, 1853 (Stat. 1852-3, 175, § 24), entitled "An act in relation to certain state roads therein named," provided for a state road from Bloomfield, in Davis county, to Winterset, in Madison county, and appointed commissioners to locate it; that all the steps and proceedings required by the act, had been taken; that one Thomas Davis claimed damages, which were assessed by appraisers at three hundred dollars; that the county judge ordered the road to be established, upon condition that the persons interested would pay the said three hundred dollars damages; and that the said judge refused to pay the said

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damages, and to order the supervisor to open the road. The alternative writ was issued, and commands the county judge to enter an order establishing the road absolutely; to order the three hundred dollars to be paid from the county treasury, and to notify the supervisor to open the road according to law, or to show cause. The defendant answered, showing cause against the writ, alleging, among other things, that the act establishing the road is unconstitutional, and that the alternative writ should not have been allowed. The District Court held the answer to be insufficient, and on motion for a peremptory writ, sustained the same in part, and ordered that a peremptory writ of mandamus do issue, commanding the county judge of Davis county, to forthwith direct the proper supervisor of roads, to have opened and worked according to law, so much of the said road as lies in Davis county, and that the said county pay the costs of this proceeding. From this order the defendant appeals, and in this court alleges for error, that the court erred in allowing the writ of mandamus, and in making the order for the peremptory writ.

Knapp & Caldwell, for the appellant.

Palmer & Trimble, for the appellee.

WOODWARD, J.—The first question presented, is, whether the act entitled "An act in relation to certain state roads therein named," approved January 22, 1853, is constitutional? The objection is made, that it is contrary to article 8, section 26 of the constitution, declaring that "every law shall embrace but one object, which shall be expressed in the title." The act in question contains sixty-six sections, in which it establishes some forty-six roads, and vacates some, and provides for the relocation of others. Is here a plurality of object, in the sense of the constitution?

The title of this act will be observed, and it will be noticed that all the sections of the act (except the last, as to taking effect), relate to roads, either establishing, vacating

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or relocating them. Section fifty-five, constituting a certain county line a road, is not an exception; nor is section sixty-one, which changes a certain county road into a state road. The intent of this provision of the constitution was, to prevent the union, in the same act, of incongruous matter, and of objects having no connection, no relation. And with this, it was designed to prevent surprise in legislation, by having matter of one nature embraced in a bill whose title expressed another. It is manifest, however, that there must be some limit to the division of matter into separate bills or acts. It cannot be held with reason, that each thought or step toward the accomplishment of an end or object, should be embodied in a separate act. When we find in the revenue law provisions concerning the county treasurer's powers to levy upon and sell personal property as a constable, or concerning his fees, or relating to pedler's license; and when we see in the school law, provisions about the superintendent of public instruction, and the school fund commissioner, and about school district officers, and their bonds, and about state, and county and school district funds; we are not surprised, and no one suspects a breach upon the constitution. These things are congruous with the end proposed. But if we should find in one of these acts, a bank charter, or some provision establishing roads, or giving the right of way to railroads, or concerning the law of mechanics' lien, we might well be surprised, and say, this is not what it professes. Many other instances of both these kinds, might be named.

It is important to bear in mind, that to declare an act unconstitutional and void, is the exercise of the highest power of the court, and is not to be resorted to, unless it become necessary. Although the power is to be exercised when the case demands it, yet the courts will not favor it, nor use it, unless in a clear and decided case. And it is the duty of the courts to give such a construction to an act, if possible, as will avoid this necessity, and uphold the law. *Fisher v. McGirr et al.*, 1 Gray, 1; *Rice v. Foster*, 4 Harringt. 479; *State v. Cooper*, 5 Blackf. 258; *Ogden v. Saunders*, 12

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Wheat. 270; *Calder v. Bull*, 3 Dall. 386; *Fletcher v. Peck*, 6 Cranch, 87; 2 Pet. 522; 19 J. R. 38; 1 Cow. 550; 4 Dall. 309.

We are still in the days when the legislature may be called contemporaneous with the constitution, and when its acts may be considered as a contemporaneous construction of that instrument. And still more true is this of the past years. We will look at the acts of the session of 1846 and 1847, the first after the adoption of the constitution. The "object" of an act may be broader or narrower, more or less extensive; and the broader it is, the more particulars will it embrace. The revenue, school, and justices' acts, and others, are broad and cover many particulars. But it may be said that these differ from such an one as that before us; that there is a unity in the ultimate object, toward which the particulars tend, which does not belong to the other; that these particulars have a relation, an affinity, to each other, whilst each and all tend to the general object; and that in the case before us, the particulars have no relation, no affinity, and one does not aid the other. There is an appearance of truth in this argument, at first thought, but it is doubtful if the distinction exists in reality. There is really no more unity of object in an act to establish a system of common schools, or to consolidate the general laws of the state, than there is in the one to organize and establish certain counties, or to establish a system of state roads. In all such cases, the whole of the matter is homogeneous, and falls under some general idea expressed in the title. The unity of object is to be looked for in the ultimate end, and not in the detail or steps leading to the end. In accordance with this idea, has been the legislation of this state to this time. Let us turn to the statutes of 1846, 1847. Chapter sixty-first, page 78, relates to the clerk of the District Court, clerk of the board of county commissioners, and the county treasurer and recorder. What holds these divers matters together, and makes a unity of object? Merely the idea that they shall hold their respective offices at the county seat. Chapter sixty-six, page 81, is an act to establish new

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counties, &c. More than one county is established, and boundaries are defined, the governor is authorized to appoint certain officers in them, and the jurisdiction of justices of the peace, is provided for. Chapter one hundred and twenty-four, page 183, is an act whose object occurs at every session, and is commonly expressed by the phrase, "To provide for the support of the state government," and this is the object, in whatever terms it may be expressed. Here, under one head, or object, occurs a vast variety of particulars, having no relation to, or connection with, each other, except as they are united in the idea of the "support of the state government." And it is probable that no one ever doubted the validity of these acts; not even of the last named, and required each appropriation to be embodied in a separate act. Again, in the same volume, page 77, chapter fifty-nine, is an act for laying out and establishing certain roads therein named. The act consists of eleven sections, and ten roads are established by it. This is exactly like the one in the case at bar. Some weight is due to the fact that in this first General Assembly, were many men who were members of the convention which formed the constitution, and inserted this *new* provision. This consideration is not conclusive, by any means, it is true; but it assists us in arriving at the intent of the constitution. There is, undoubtedly, great objection to uniting so many particulars in one act, but so long as they are of the same nature, and come legitimately under one general denomination or object, we cannot say that the act is unconstitutional. This subject is brought under consideration in the case of *Santo et al. v. The State*, ante, 165. The case of the *Sun Mutual Ins. Co. v. The Mayor, &c., of New York*, 4 Seld. 241, throws light upon the matter. The constitution of the state of New York provides, that "*no private or local bill shall embrace more than one subject, and that shall be expressed in the title.*" The act in question was entitled, "An act to enable the supervisors of the city and county of New York, to raise money by tax." It contained a single section, and authorized that body to raise and collect, by tax, a sum not exceeding (in round

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sums) \$1,600,000 for contingent expenses; \$400,000 for public expenses; \$185,000 for lamp district; and \$295,000 for deficiency in the taxes of the preceding year. It was objected that these constituted different "subjects." But, says the court, "these are not different subjects within the meaning of the 16th section of the constitution. If the power granted to levy the tax is one subject, which has not been questioned, then if the mode in which that power is to be exercised is another, there would be no way of complying with the constitution, except by embodying the whole act in the title." "So, the purposes for which the money is to be raised are not different subjects." "There must be but one subject, but the mode in which the subject is treated, or the reason which influenced the legislature, could not, and need not be stated in the title, according to the letter and spirit of the constitution." It will be noticed that the word subject is used here. There is much reason to believe that this word has, in such a use of it, a narrower signification than the word "object." And this would be consistent with its use in a private or local act, whilst the word "object" would be appropriate to a public or general one. To sustain the objection in the case at bar, would be to hold a doctrine which would render null a large portion of the legislation of the state, and render future legislation so inconvenient as to make it nearly impracticable. Such a construction, we think, is neither demanded nor warranted.

Second. The second error assigned is, that the alternative writ should not have been allowed.

Under this it is alleged, that a proper case was not made out. The writ recites the relation upon which the writ was granted; and the question arises, whether Weir holds any such relation to the matter as to enable him to sue for the writ. Section 2183, in chapter 125 of the Code, relating to mandamus, provides that this writ may be "issued on the information, under oath, of the party beneficially interested," &c. Is Weir, the relator, beneficially interested in the matter, or in the granting of the writ? The statute seems to contemplate, not that every one who pleases may sue out this

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writ; but that either the public, through its officers, for the enforcement of a public duty, or an individual, having a right to be enforced, or an interest to be affected. The case before us, however, does not show *any* right or interest whatever, in the relator, in connection with the object of the writ. He shows no private interest, nor does he show that he is even a citizen of the county, or of the state. It would seem from the papers, that Weir was seeking to enforce the payment to Thomas Davis of the three hundred dollars awarded to him. So far as appears to us now, Davis might make this application, but we do not see upon what ground Weir can make it. And he does not set forth any ground, upon which *he* should seek to enforce the opening of the road—not even that he is a citizen of the county, and interested in common with all. It is not intended to say definitely whether this would be sufficient, but it is suggested, to show that a case is not made which will raise even that question. The state does not complain, and seek through the public officers, to enforce her law, and we are not prepared to say that any one who chooses, may do it. See the case of *The People v. The Canal Board*, 13 Barb. 432, 443.

The judgment of the District Court is reversed, and the writ is quashed.

WRIGHT, C. J.—I concur in the conclusion, that the case should be reversed on the last assignment, but doubt as to the first. I am not prepared to hold such legislation constitutional, but incline to hold that the objection is well taken.

Mudgett v. Park.

MUDGETT v. PARK.

A party is not confined to twenty days after judgment is rendered against him by a justice of the peace, within which to sue out a writ of error.

Appeal from the Scott District Court,

In this case judgment was rendered before a justice against defendant, on the 13th of April, 1855, and on the 17th of May, a writ of error issued on his affidavit to remove said proceedings into the District Court. In that court, on motion of plaintiff, the writ was quashed, because it was not issued, nor applied for, within twenty days after the judgment was rendered by the justice. Defendant appeals, and assigns this ruling for error.

Cook & Dillon, for the appellant.

W. E. Leffingwell, for the appellee.

WRIGHT, C. J.—This same question was raised and decided in the case of *Porter & Lucas v. Helmick*, ante, 87, and according to the construction there given to the statute, this case must be reversed. We are unable to see upon what principle it is, under our law, a party is confined to twenty days after judgment within which to sue out his writ of error. It may seem unreasonable that the legislature should have left the time for bringing this writ, indefinite and unlimited. But that it has been so left, we think is clear. There is no period fixed in terms, and we see no room for holding, there is by any fair analogy. That there should be a limitation, clear and definite, cannot be doubted; but the evil and confusion resulting from the present state of the law, must be remedied by the legislature, and not by this court. We cannot make the law; our duty is to declare it.

Judgment reversed.

Henry v. The Dubuque and Pacific R. R. Co.

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HENRY v. THE DUBUQUE AND PACIFIC RAILROAD COMPANY.

Section eighteen of the first article of the constitution of the state of Iowa, which provides that private property shall not be taken for public use, without just compensation, means that the person whose property is so taken, shall have *a fair equivalent in money*, for the injury done him by such taking.

The term "damages," in the fourth section of the act entitled "An act granting to railroad companies the right of way," approved January 18, 1853, has relation to the provision of the constitution under which the property may be taken, and is *precisely synonymous* with the phrase "just compensation," there used.

The just compensation to which the owner of the land is entitled, should be precisely commensurate with the injury sustained by having the property taken—neither more nor less.

The right of way conferred by the statute, and acquired by a railroad company, is the right of way peculiar to a *railroad*, and contemplates all which is necessary and proper for the construction and maintenance of a railroad over the premises.

It is the right (within the limits of quantity, as allowed by the statute to be taken), to all freedom in locating, constructing, and conveniently using and repairing the road and its appurtenances; and for such purpose only, of taking, removing and using any earth, gravel, stone, timber, or other materials, on or from the land so taken.

As a railroad is designed to be a level road, or nearly so, the right to construct, includes the right to make deep cuts, or high embankments, as the topography of the land may require.

As the convenient use of a railroad contemplates rapid locomotion, all the rights necessary thereto, as against the owner of the fee, are incident to the appropriation of the land for railroad purposes.

The right of way acquired by a railroad company, is not limited to the life of the charter, or articles of incorporation, of the company, but is intended to be perpetual, if the company, its grantees, or assigns, continue to occupy the land for the purposes for which it was appropriated.

The fee of the land appropriated for railroad purposes, remains in the owner, subject to the easement acquired by the company; and the rights of the company and those of the owner in fee, are as distinct and separate, and each is as independent of the other, as the rights of adjoining land owners in fee.

Any reciprocal relation that subsists between railroad companies and the owners of the fee of land, is either founded on agreement, or created by statute; and the only relation of this character, which exists by statute, is that created by section sixteen of the act granting to railroad companies the right

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of way, approved January 18, 1853, which provides that where a person owns land on both sides of the road, the corporation may be required to furnish a crossing.

Where no statutory regulation exists, defining the duties of railway companies as to fence, they are under no obligation to erect fences between their road and the adjoining land.

Chapter fifty-two of the Code, regulating partition fences, is not applicable as between the owner in fee of land and a company having a right of way for a railroad over such land.

As no reciprocal obligation exists between the owner of the right of way over, and that of the fee, in land, whereby either may compel the other to fence, the *building of fence* is not necessarily an element to be taken into consideration by the commissioners, in assessing the damage occasioned by the right of way.

The proper mode of ascertaining the damages occasioned by taking the right of way over land, is to determine the fair marketable value of the premises before the right is set apart, and then again after; and the difference will be the true measure of damage; and when paid, will be, in a legal sense, just compensation.

The *present values*, taking into consideration the extent of the rights conferred, are those which are to be arrived at; and the *immediate and necessary consequences* of parting with the right conferred, must necessarily enter into the consideration of the commissioners, in assessing the damages.

The premises, as *left* in the condition they will be, after the right of way is taken, together with the damages assessed, should be equal in value to the premises immediately before the taking of such right of way.

In assessing the damages, all the circumstances that *immediately depreciate* the value of the premises, by taking the right of way, are proper to be considered, and none others.

In case the land was fenced, and by taking the right of way, it is thrown open, and left in a manner unfenced, this fact will be taken into consideration in arriving at the depreciated value of the remaining premises.

How the road may affect the value of the land, if completed, or any other consideration of *future* benefit; or any *abuse* of the privilege, or probability of abuse, by the company; or any unwillingness on the part of the owner to allow the road to go over his land, is not in any manner to be considered, in the assessment of the damages, arising from taking the right of way.

Where an appeal is taken from the finding of the commissioners appointed to assess the damages created by taking the right of way, and the appeal is heard in the District Court before a jury, the witnesses called by the respective parties, may be permitted, on their examination in chief, to give their *opinion* of the value of the premises *before and after* the taking of the right of way, leaving the opposite party, by his right of cross-examination, to learn the ability of the witness to judge in the premises, and what he takes into consideration in making up his judgment.

But in such cases, the opinions of the witnesses must be confined to the premises over which the right of way is taken.

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Appeal from the Dubuque District Court.

THIS case was before the District Court on an appeal from the finding of six commissioners, appointed by the sheriff to assess plaintiff's damages, on account of defendants having laid their road over his land. The bills of exceptions show, that on the trial of the cause, the court established the following rules and regulations, to be observed in the propounding of questions, in relation to the extent of damages :

1. What was the fair cash value of the land taken, at the time it was taken for public use, if the owner were willing to sell, and the company desirous to buy, that particular quantity at that place, and in that form ?

2. Is it in the country, a village, or a city ?

3. With reference to remaining land, is it on the outer line, with the bed of the road only on the land, or does it run so as to divide the land in a regular or awkward form ?

4. Is it so run as to cut off from the main lot a portion of ground, that for quantity or form, is salable or not ?

5. What sum will make the plaintiff as good as if the railroad had not been located on his land ?

6. What sum will make his farm as valuable as it would be, if the railroad had passed over his neighbor's farm, and not his own ? The general advantage of the railroad to the neighborhood of the land, is not to be taken into consideration, and deducted from the damages ; but if it is of any special advantage to plaintiff—if it makes any particular lot more salable—if it drains some part of the land—or if it fertilizes some part—or if it opens an avenue to him, not common to others—all such and similar advantages are to be considered by the jury, and to be deducted from the damages which you may find.

7. What particular advantage is it to plaintiff as an owner of the land, because of the railroad being located through it, rather than upon some other land in the vicinity ?

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8. The general effect that the actual or contemplated construction of the railroad may have upon the value of the land, is not to form an element, or be considered in the valuation.

To each and every part of this ruling, the counsel for the railroad excepted. The bills of exceptions show further that claimant proceeded to interrogate witnesses in accordance with the above rules; that one witness testified, that in his opinion, considering the circumstances of the case, the claimant should receive two hundred dollars an acre for the quantity of land taken, or that the land taken was worth that much, taking into consideration the consequences to the balance of the property; that the farm was worth about fifty dollars an acre as a whole, and that the strip taken was about as good as an average of the place. Another witness testified to one hundred and fifty dollars an acre for the quantity of land taken, taking into consideration the circumstances of the case as aforesaid; that the strip might be a little better than an average of the place; and that the whole place was worth about fifty dollars an acre. Several other witnesses expressed similiar opinions, varying somewhat in amount. The railroad company introduced evidence to show, that a station had been located on the adjoining forty acres of ground; that a town was being laid out there; and that the market value of the farm of claimant had been increased in value, in consequence of said station being so located; and also introduced the assessment roll made out by T. F. Henry, the father of claimant, under oath, in June, 1855, in which said lands were returned as worth fourteen dollars an acre; and it appeared in evidence that T. F. Henry was the assessor of that township, and was the agent of the claimant. A plot of the land and road was also introduced in evidence, by which the quantity of land taken appears to be between nine and ten acres.

The court instructed the jury, as follows: "This is an appeal by the plaintiff from the decision of the jury impaneled by the sheriff, to assess damages of plaintiff, resulting from the laying out the railroad through his land. The

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question for you is, what damages will the plaintiff sustain by the appropriation of the land of the plaintiff, for the use of the railroad corporation? This is your inquiry as directed by the statute. This statute is founded on the right of eminent domain; it is the right to take private property for public use, when the good of the public requires its surrender, and this right is incident to sovereignty, and exists in every government. The obligation to make compensation, follows the right. The appropriation of the land is merely the right of way over it. The title to the land remains in the plaintiff, subject to the right of way of defendant over it. The question as to what is the rule of damages, is one which involves important considerations, and demands more reflection than I have been able to bestow since the investigation of this case commenced. The following rules will be observed by the jury in estimating plaintiff's damages.

1. You will inquire what was the fair cash value of the land appropriated, at the time it was taken, if the owner was willing to sell, and the company desired to buy, that particular quality, in that place and in that form?

2. With reference to remaining land, you will inquire whether the road is located on the outer line, with the bed of the road only on the land, or does it run so as to divide the land in a regular or awkward form?

3. Is it so run as to cut off from the main lot, a portion of ground that for quantity or form is valuable or not?

4. What sum will make the plaintiff as good, as if the railroad had not been located on his land?

5. What sum will make his farm as valuable as it would be, if the railroad had passed over his neighbor's farm, and not over his?

The general advantage of the railroad to the neighborhood of the land, is not to be taken into consideration, and deducted from the damages; but if it is of any special advantage to the plaintiff; if it makes any particular portion of his land more salable; or if it opens an avenue to him not common to others; all such, and similar advantages, are to

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be considered by the jury, and to be deducted from the damages which you may find.

You will find a separate verdict for the value of building and keeping in repair the fence, during the time of the existence of the railroad charter.

To each and every part of these instructions, said company excepted, and asked the court to instruct the jury as follows:

3. That if the jury believe, that witnesses have testified that the strip of land taken was worth two hundred dollars; some one hundred and fifty, and some one hundred dollars; and that such witnesses based their opinion of the value, upon the injury which accrued to the balance of the land, and not upon the intrinsic value of the particular strip taken; that they should entirely reject and leave out such testimony, as being entirely illegal and improper; and that witnesses have no right to give any opinion of the value of the particular strip taken, upon a supposed injury done to the balance of the property.

4. That the just compensation which the appellant is entitled to receive in this case, is the amount of actual injury sustained. If the jury believe that the balance of his land is worth more now, than the whole farm would have been, if this railroad had not been projected, and that this increased value of the balance, is owing to the projection and location of this road; then they must find only nominal damages; that the plaintiff is not entitled to pocket the benefits, and then recover the full amount of all damages, leaving out of sight the benefits which he had received.

5. That the plaintiff cannot recover for the value of a fence which he has not constructed, nor is he entitled to recover damages and imaginary expense, which he may believe he will incur in keeping the fence in repair for the next fifty years; that there is no law authorizing the recovery of anything for a fence, nor for keeping a fence in repair.

The court refused these instructions, and defendant excepted, and asked the following instruction: "That if a town

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is being laid out adjoining to the land, and the market value of this and the adjoining land is greatly increased in consequence of building the railroad, and the location of a station at the particular point, that this is matter to be taken into consideration, in ascertaining the amount of damages."

The court refused to give this instruction as asked, but added to it, "if the benefit is peculiar to plaintiff's land." To the refusal to give this instruction as asked, and the giving it as modified, defendant excepted.

The jury returned the following verdict: "We, the jury, agree to find for the plaintiff, and assess his damages at five hundred and ninety-one dollars on the land. We further agree to find for the plaintiff, and award him five hundred and ninety-two dollars for building the fence, and eight per cent. per annum, for keeping the same in repair for forty-eight years, to be paid annually." Whereupon the defendant moved for a new trial, on the following grounds:

1. That the verdict was contrary to the evidence and the weight of evidence.
2. The court erred on the points of law raised during the introduction of the evidence.
3. The court erred in allowing improper evidence to be laid before the jury.
4. In excluding proper evidence from the jury.
5. In its charge to the jury.
6. In refusing the third, fourth, and fifth instructions asked in behalf of the company.
7. In giving the opening and closing of the case to appellant, which motion was overruled by the court, and the court proceeded to render judgment on said verdict, for the sum of \$1,183 and costs, in favor of said Henry, and also "that plaintiff have and recover of and from said defendant, the further sum of eight per cent, on the sum of five hundred and ninety-two dollars for the term of forty-eight years, to be paid annually on the 5th day of December, and that on the 5th of December, A. D. 1856, the said plaintiff, have execution against said defendant, for the sum of forty-seven dollars and thirty-six cents, besides the costs of execution.

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And that the like execution issue each year from and after the 5th day of December, A. D. 1856, for forty-seven years thereafter, to be in full of said sum of eight per cent. on the said sum of five hundred and ninety-two dollars." From this judgment said company appeals, and assigns for error the following:

1. In allowing witnesses to give opinions to the jury, based upon consequential injuries supposed to have been done to other lands than those condemned.
2. In allowing witnesses to state opinions of the value of the land, based upon the idea that the land was within or near a village, when the evidence showed that the village consisted of a railroad station made by the company.
3. In allowing witnesses to state their opinion in relation to consequential injuries, but not as to consequential benefits.
4. In assuming that the said Henry was entitled to the benefit of the supposition, that the railroad would be located on the said neighbor's land, and leaving it to the jury to say what sum would make him as good as though it had not been so located.
5. In restricting the benefits accruing to the claimant to those which were peculiar to him, whereas the said company are entitled to set off all benefits accruing to the said Henry, though other people might have been benefited in the same way.
6. In refusing the third, fourth, and fifth instructions asked for by the railroad company.
7. In qualifying the seventh instruction asked by the company.
8. In overruling the motion for a new trial.

Smith, McKinlay & Poor, for the appellant.

Compensation and damages mean the same thing. See Const. of Iowa, in Code, 545; 2 Greenleaf's Ev. 243. Compensation for injury—recompense for actual loss—the actual loss—the extent of the injury—can be exactly fixed, by ascertaining the value just before the injury, and the value after the injury has been sustained; the difference of value before

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it was injured, and the value in the damaged condition, will be an exact compensation for actual loss—this is the rule laid down by this court in the case of *Sater v. The Burlington Plank Road Co.*, 1 Iowa, 386; see also, Angel on Water Courses, 499; 14 Ohio, 173 and 541; Smith's Commentaries on Const. Law, 468; Sedgwick on the Measure of Damages, 110, 112. The compensation, the actual amount of damage, no doubt, should be paid in money; nor do we offer to pay anything else.

As to the fence, it will be time enough to pay for it, when it is built; the Code regulates that matter. § 909; *The Rensselaer and Saratoga R. R. Co.*, 4 Paige Ch. 553; 1 Amer. R. R. Cases, 214; 2 Harrison (New Jersey), 25.

This thing of recovering damages for fences, or anything else, before the damages really accrue, is not legal. 9 Barb. 256. The provisions of the Code are simple, and the propriety of such a provision, applies to this country with more force than it would in the old states, as cattle run here at large; there they are kept up. *Quimby v. R. R. Co.*, 23 Vert. 387; *S. C.* in American Railway Cases, 251, quoted by the other side, recognize the principle of division fence.

When private corporations, or those that have private rights and stocks, take lands, they will be regarded as persons, and as such they will be liable to make their part of partition fences. But purely municipal corporations, being only a co-ordinate part of the government, will not be subject to the same rule. Railroad, plank road, and turnpike companies are only persons. The case quoted from 4 Chand. (Wis.) 82, is founded on a different constitution and law from ours. "The constitution required payment of the value of the land taken, but the statute gives the owner further, his damages, if there be any, by reason of the taking of his land, over and above benefits." Our constitution and law do not first give the value, and then the consequential damages in addition; but there is to be a compensation for actual damages.

As to the opinion of witnesses, see 13 United States Dig. 564, § 76; *The Montgomery and West Point Railroad*

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Co. v. Varna, 19 Ala. 185. The better mode is, to let witnesses state the facts, and leave the extent of consequential injuries to the jury. The cases quoted, showing that the claimant was entitled to the open and close of the case, arose under statutes materially different from ours. They are not only *claimants*, but *petitioners*; by our statute, they are not petitioners nor plaintiffs; they are virtually defendants.

Burt & Barker, for the appellee.

I. The expense of making and keeping in repair necessary fences, along the road, was properly included in the assessment of damages.

The statute requires the jury to "assess the damages the owner will sustain by the appropriation of his land." Laws of 1852, chapter 31, § 4. (See how different from plank road act, chapter 131, § 49.) The statute is designed to cover all claims for damages occasioned by the appropriation, and is exclusive of any remedy at common law. *Mason v. The K. & P. Railroad Co.*, 31 Maine, 215; 1 American Railway Cases, 166.

Railroad companies are not bound, by the common law, to fence their roads. The obligation to fence can only be imposed by statutory enactments. *Hurl v. R. & B. Railroad*, 25 Vermont, 116; *Langlois v. B. & R. Railroad Co.*, 19 Barb. 364; 1 American Railway Cases, 210, N. 212.

The statutes of this state do not require railroad companies to build any fences. Chapter 31, laws of 1852. The act in relation to division fences (chapter 52 of the Code), does not apply to railroad companies, for the reasons: 1. The railroad company do not, under the statute, acquire the title in fee, to the land appropriated, but simply an easement—the right of way. 2. The remedy would be inadequate, as the Code does not compel a land owner to fence, other than "inclosed land." 3. The whole language of the act precludes the application to railroads. *Quimby v. V. C. R. R.*, 23 Vermont, 387; *Dean v. Sullivan R. R. Co.*, 2 Foster, 316; 4 Paige, 553; 16 Barbour, 270; 15 Ib. 36; 2 Harrison, 25.

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The appropriation of land through improved farm land, creates the necessity of building and maintaining fences which would otherwise not be required; and the company should, therefore, be compelled to pay the expense of fencing, as part of the damages the party sustains, by reason of the appropriation of his land.

It has been decided that the expense of fencing, was a proper item to be included in damages for land appropriated by railroad companies. *Curts v. V. C. R. R. Co.*, 23 Vermont, 613; *Quimby v. V. C. R. R. Co.*, 23 Ib. 387; *Morse v. B. & M. R. Co.*, 2 Cushing, 536; *Mason v. R. & P. R. Co.*, 31 Maine, 215; *The M. & M. R. R. Co. v. Eble*, 4 Chandler, 72; 4 Paige Ch. 553; *First Parish in North Bridgewater v. County of Plymouth*, 8 Cushing, 475; *George Lawton v. The Fitchburgh R. R. Co.*, 8 Cushing, 230; *Sater v. The B. & Mt. Pleasant Plank Road Co.*, 1 Iowa, 386. In the case in 4 Paige, 553, it is held that but one-half the cost of fencing should have been included in damages, as the railroad owned their land in fee, and the statute in relation to division fences, applied then in New York. The same reasoning that would compel an owner of the land appropriated, to build any part of the fence, would require him to build the whole. But no exception of this character was taken in the court below.

There is no error in the instructions of the court below. The charge of the court was too favorable to the appellant, upon the rule of damages. The "just compensation" required by the constitution to be made, when private property is appropriated to public use, means a full compensation; and it must be made in money, and not in speculative advantages of some future railroad, which he does not consent to purchase.

There is a class of authorities in some of the states, that would seem to allow the advantages of a railroad to be set off against the damages sustained by appropriations of land; most, or all, of these cases, are founded upon some express statutory provision, and follow the statute, in preference to the constitutional provisions.

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There are other cases which seem to follow the same doctrine, in relation to assessments for the improvement of streets in cities. These cases are properly an exercise of the taxing power, not the right of eminent domain. The act under which this proceeding is had, makes no provision, allowing a set-off of benefit against damages, but requires all damages to be paid. This statute must be strictly construed against the company, as grantee from the state, and liberally in favor of the respondent.

The constitution, the statute, and public policy, require the rule to be established, rejecting the allowance of supposed future advantages, as a set-off against the value of property taken. It is certain and easy of application. It is the only rule that will effectually shield the citizen from a dangerous exercise of an extraordinary power, in depriving him of his property. Constitution, art. 1, § 18; 4 Comst. 420; Am. Railway Cases, 58; 1 Ib. 552; 4 Chandler, 72; 4 Ib. 88; *Woodfolk v. N. & C. R. R. Co.*, 1 Am. Law Reg. 550; Smith's Com. § 318; *The Albany N. R. R. Co. v. Lansing*, 16 Barbour, 68; 19 Barbour, 171.

The court did not err, in allowing the respondent to open and close. 1 Am. Railway Cases, 450; 16 Barb. 68.

The opinion of witnesses was properly received. 1 Am. Railway Cases, 434.

ISBELL, J.—This case involves the question, what is the true measure of damage where land is taken for railway purposes? In the case of *Sater v. The Burlington and Mount Pleasant Plank Road Company*, 1 Iowa, 386, the principle at the foundation of this suit, was considered. But little argument was had in that case, and a petition for rehearing is now pending; it will, therefore, be proper to review the ground there taken.

No question is made in the case before us, on the right of the state to authorize the taking of land for public use, by railway companies. The objections to the ruling of the District Court, in the admission of testimony, to the instructions given and refused, and to refusing to grant a new trial, are

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in argument, all brought to bear on one point, viz : whether the court adopted a true basis of estimation of damage or compensation for the property taken.

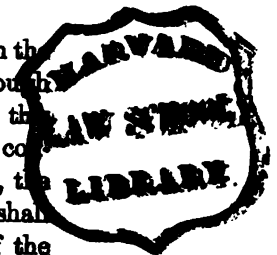
The proceeding was had in pursuance of chap. 31, of Session Laws of 1853, entitled an act granting to railroad companies the right of way. By this act, it is made the duty of the commissioners appointed by the sheriff, "to inspect said real estate, and assess the damages which said owner will sustain by the appropriation of his land, for the use of said railroad corporation." The counsel have dwelt somewhat on the meaning of the word damages. Although this word may equally apply in various cases, where different *measures* of damage may be allowed, and is subject to various qualifications, as exemplary, compensatory, nominal, and the like; yet in the connection here used, we have no doubt it has relation to the provision of the constitution under which the property may be taken (art. 1, § 18), and is *precisely synonymous* with the phrase "just compensation," there used. That the language of the constitution means, that the person whose property is taken for public use, shall have a *fair equivalent in money*, for the injury done him by such taking; in other words, that he shall be made whole, so far as money is a measure of compensation, we are equally clear. This just compensation, should be precisely commensurate with the injury sustained, by having the property taken; neither more nor less. 2 Greenl. Ev. § 253, and notes 1 and 2; Angell on Water Courses, 499; Smith's Com. on Const. 468, 470; Sedg. on Damages, 110, 112. So far there is no difficulty. But the moment we attempt to apply rules to the *ascertainment* of this equivalent—when we attempt to define what shall, and what shall not be taken into consideration in arriving at it—owing to the variety of circumstances attending such admeasurements, the subject becomes involved in difficulty. When we look into the adjudged cases, we find that courts of different states have adopted different rules to this end. Some of this difference, to be sure, is in consequence of the provisions peculiar to their constitutions, and statute laws; while we find others differing widely, where these do not oc-

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occasion the difference. Some attempt to enumerate with particularity, the various round of circumstances which shall be taken into consideration in assessing damage; others lay down general rules only, and refuse to disturb assessments, where not clearly satisfied that the principles of such rules have been violated.

It is highly desirable, that such a rule should be adopted, as, while just, will be simple, and easy of application, and at the same time be consonant with the established principles of the common law. It is quite obvious that much of the value of any rule on the subject, must consist, in the generality of its application and its simplicity. It should be equally applicable in making assessments in the field, and in the court room, on appeal. It is also quite obvious, however, that any rule on the subject, must primarily have regard to the extent of the interest appropriated to public use. Thus, the first consideration of the commissioners is, what is to be taken from A. and acquired by B. for public use? Is it the fee of the land, or something less than the fee?

In one branch of the argument, stress has been laid on the words of the statute, "appropriation of his land," as though the statute contemplated the taking of the fee. But this view is not warranted by the statute, when the whole is construed together. To say nothing of the title of the act, the proceeding to appraise, is had only where the owners shall refuse to grant the right of way, and in the language of the context, the company is "thereby authorized to construct and maintain their railroad over and across said premises." It is the right of way that is appropriated; not, however, simply, the right of way, as that phrase is defined in the old books of the common law, written before railways had an existence, but as defined and regulated by statute. It is that right of way peculiar to a railroad. It contemplates all that is necessary and proper for the construction and maintenance of a railroad over the premises. It is the right (within the limits of quantity allowed by the statute to be taken) to all freedom in locating, constructing, and conveniently using and repairing the road and its appurtenances; and for such purpose



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only, of taking, removing, and using any earth, gravel, stone, timber, or other materials, on or from the land so taken. And as such road is contemplated to be a level road, or nearly so, this right to construct, of consequence, contemplates the right to make deep cuts, or high embankments, as the topography of the land may require. And again: as the convenient use of such road contemplates rapid locomotion, the rights incident thereto, as against the owner of the fee, are incident to the appropriation.

The next question that will arise in the minds of the commissioners, is, what is the extent, in *duration*, of this right of way? Does the company acquire an estate in perpetuity, or for a limited period? The District Court evidently proceeded upon the idea, in the trial of this cause, that this right was limited to the life of the charter, or articles of incorporation. Is this so? The statute granting the right of way, nowhere intimates such limitation. The only limit to the right of way of railroad companies, so far as our attention has been called, is found in section 776 of the Code, as consequent upon a non-user of the right. And in order to a restoration of the land, in that case, a refunding of the money paid for the right, without interest, is requisite. While section 681 of the Code permits the formation of companies to endure for fifty years only, and section 735 limits the licensing to that period, yet by the former section, such companies may be renewed by a compliance with the statute, for periods of fifty years, and nowhere is there any provision for a re-assessment of damage for the right of way, on a renewal of the charter. It is not certainly intended by the legislature, that such works shall cease, because their charter shall have expired. We therefore, conclude, that the right of way acquired by the company, is intended to be in perpetuity, if the company, its grantees, or assigns, continue to occupy the land for the purposes for which it was appropriated. But as this is a question not directly made in the case, but arising incidentally, and not having been argued, we refrain from pronouncing upon it too positively.

These are the rights which the company acquire on the

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payment of the damages assessed. They are conferred upon it by force of the statute, and the law will protect these rights: That is to say, no action will lie in favor of the owner of the fee, for anything done on the part of the company, in the legitimate exercise of these rights. *Mason v. Kennebec and Portland R. R. Co.*, 31 Maine, 215; *S. C.*, 1 Amer. Railway Cases, 162. And see authorities cited in note, 1 *Ib.* 166. On the other hand, the owner of the fee parts with no other or further right than the statute confers. The fee of the land remains in him, subject to the easement acquired. The rights of the *company*, and those of the *owner in fee*, thus far, are as distinct and separate, and in legal contemplation, are each as independent of the other, as the rights of adjoining land owners in fee. Any *reciprocal relation* that subsists between the parties, is either founded on agreement or statute law. The only relation of this character, so far as we have been able to discover, which the commissioners should take notice of, is that created by section 16 of chapter 31, Sess. Laws, 1853, providing, that where a person owns land on both sides of the road, the corporation may be required to furnish a crossing.

But, in addition to this, it has been insisted on the one hand, that the company should fence their road; and inasmuch as the statute does not compel it to do so, that the *price of fence* should be allowed in assessing damage; and on the other, that the company is bound, at least, to build one-half the fence along the line of the road; and therefore, this much at least ought not to be taken into account by the commissioners; and that the company ought not to pay for fence, which they may be compelled to build. Where no statutory regulation exists, defining the duties of railway companies as to fence, they are under no obligation to erect fences between their road and the adjoining land. *Langlois v. The Buffalo and Rochester R. R. Co.*, 19 Barb. 396; *Perkins v. The Eastern R. R. Co.*, 29 Maine, 307, and authorities cited in note to 1 Amer. Railway Cases, 212; *Hurd v. R. & B. Railroad Co.*, 25 Vert. 116.

But appellant insists, that the statute regulating partition

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fences (Code, chap. 52), is applicable as between the owner of the fee, and a company having a right of way for a railway over it; and that although the right of such company may not be such as to clearly bring it within the meaning of the words "owners, occupant, or tenant," as used in that chapter, yet that the provision of section 909, applies to such occupants, and makes them amenable to the determinations of the fence viewers as to their duty in relation to fencing. That section, being a part of chapter 52, is as follows: "When any question arises between parties other than above stated, concerning their rights in fences, or their duties in relation to building, or supporting, or removing them, such question may be determined by the fence viewers, upon the principles of this chapter." This presents a point of some doubt, and one which we have endeavored to examine with much care. While the statute, at first view, would appear sufficiently broad to at least justify the construction contended for, yet on a careful review of the whole chapter, we fail to become satisfied that it was the intention of the legislature, to dispose of the whole subject of the duty to fence as between this special class of tenants, and the owner of the fee, thus summarily, without even an allusion to the subject of the right of way, or any of the various claimants of such right. It certainly was never the intention, that such a doctrine should apply as between the county and the individual over whose land a common highway might be laid. It would scarcely be claimed that it should extend to turnpike companies, or plank road companies, which are not held, even by those cases which go the greatest length, to be under any obligation to fence their roads. But it is insisted, that a railroad stands on a peculiar footing, different from either of these, as being deeply interested in having their road fenced. We cannot see, however, that such road stands on any such peculiar footing, different from turnpike roads or plank roads, that would justify us in extending the statute to include the one, and not the others. The better conclusion, we believe to be, that the chapter, from its whole tenor, was not intended to apply as between the owner

of the fee, and him holding simply the right of way over it.

But counsel for appellant go further, and say that, if a railroad company's right in the land, is not such as to bring it within the statute, in view of strict legal construction, yet equity, by analogy to the statute, will enforce the company to build one-half the fence, and, therefore, the commissioners should deduct from the damage, which would otherwise exist on this account. We are not prepared to hold on this point, to the *extent claimed*—that is to say, that any deduction should be made from the assessment of damage, on account of any equitable claim that may exist in favor of the owner of the fee against the company, to *build fence*. When one uses, and derives a benefit from, a fence actually erected by the other, then a different question would arise. In support of this view, however, counsel have cited a case so strongly in point, and from a chancellor of so high a character, that it will not do to pass over it in silence. We allude to *The Matter of the Rensselaer and Saratoga R. R. Co.*, 4 Paige, 553. That case, like the one before us, was an appeal from an assessment of damage on account of land being taken for railway purposes. There, as here, the statute relating to division fences, was not held to apply. Yet, the chancellor reduced an allowance for building fence one-half, on account of an equitable claim that the land owner would have upon the railroad company, to make and support one-half of the fence. Says WALWORTH, Chancellor in that case, "neither law nor equity will compel a turnpike company to build a fence from which it will derive no benefit." Again: "But a railroad has a deep interest in fencing against cattle, &c., from the adjoining lands, and comes within the equity of the statute." But not satisfied with this ground for his decision, he attempts to sustain it by reference to the principles of the civil law, but finally relies chiefly for his authority, on the case of *Campbell v. Mesier*, 4 Johns. Ch. 334, which was a case for contribution to reimburse the complainant for money expended in rebuilding a party-wall, already rebuilt by complainant, who had pre-

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vicious to rebuilding it, notified defendant to join with him in rebuilding the same. The wall, before taken down, was in a state of ruin and decay, and dangerous, and utterly incapable of being partly cut down; and KENT, Chancellor, allowed the claim, on the ground of common benefit. This case obviously stands on different equities from the one it is cited to support. It is not only much stronger in point of fact, in other particulars, but the complainant had already put defendant in possession of the benefit. Not so, where a deduction is made from the price of the right of way, on account of liability to fence. Although it may well be for the interest of a railway company to fence its road, it may, nevertheless, neglect that interest, and, as we have seen, is under no obligation to fence, unless required by statute. Whatever equitable right there may exist between the owner of the fee and that of the road, in case one uses and derives a benefit from a fence actually erected by the other, we think it will be high time to adjust such equities, when they actually come to exist. The language of the constitution is, that private property shall not be taken for public use, without just compensation. This has, at least, by all legislative construction, been held to mean, that making of compensation is a *condition precedent* to the taking. But we cannot learn that the case relied upon by counsel (4 Paige), has been adopted and followed by the courts of New York. See authorities cited in note, 1 Amer. Railway Cases, 212. But, however this may be in that state, we conclude that the radical error consists in the allowing pay for fence, *as fence*, at all. When we say this, we are not unmindful of the numerous decisions of other states, to the effect that the expense of fencing is a proper item to be included in damage for taking land for railway purposes, many of which have been cited by appellee. But when we say, that a party should not be allowed for fence *as fence*, in the assessment of damage, we by no means mean to be understood that, having his land *thrown open, and left in a manner unfenced*, is not to be considered; yet, as far as we have been enabled to discover, there is no reciprocal relation or obligation be-

tween the owner of the right of way and that of the fee, whereby either may compel the other to fence. If this is so, it follows that the *building of fence* is not necessarily, an element to be taken into the minds of the commissioners in assessing damage. And it should, therefore, be excluded, because it tends to mislead the mind in arriving at just compensation. As soon as it is determined that *fence* must be paid for, the questions arise, what kind of fence? and who is to keep it in repair? shall it be board, rail, or stone fence? shall the owner of the road keep it in repair, or shall the owner of the fee, or shall both share the burden? and so on, to utter confusion.

Again: in many instances, fence may not be needed. If the party owning the fee, does not desire to have his land inclosed; if it is in such locality that no fence is wanted, as is frequently the case in the immediate vicinity of a town, or in a remote district not yet settled, and entirely wild; a manifest iniquity exists in compelling a company to pay for fencing. In many remote localities, the price of two lines of fence across a quarter section of land, would exceed the present value of the whole tract. And in many places on the prairie, if two such lines of fences were actually built, as furnishing one side of inclosures for large tracts, they would enhance the value of the land tenfold the actual damage by taking the right of way over it. We think it a good reason, then, for saying that the commissioners should not allow for *fence as fence*, that peradventure a fence may never be needed.

The case before us, as the evidence *tends* to show, and as insisted upon by counsel, furnishes a forcible illustration of this view. Here \$592 has been allowed for fencing the road, or rather the residue of the land not taken, and the sum of \$47.36, annually, for keeping the same in repair for forty-eight years, and an annual execution awarded to collect the same, while it is insisted that the land is in the immediate vicinity of a town, and will be required for town lots, and no fence ever be needed. If verdicts of this character may be entailed upon railway companies, all along the lines of

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their roads, it requires no prophetic eye to see the discouraging effect they must have on such enterprises. The policy of the law is, that rights shall be certain, settled, separate, and disentangled. No such mode of raising annuities in perpetuity, can be countenanced.

The question recurs, what is just compensation for this right of way, as defined by statute, in perpetuity, subject to the relation only, that where a person owns land on both sides of the road, the company may be required to furnish a crossing? Money, in every commercial country, is the standard measure of value of property. To apply this measure truly, in a given case, is the result of judgment, in view of the state of the market. But there is no market value to injury, although there may be to injured property. The every day practice in measuring the extent of injury done to property, is to regard its value before the injury, and again after, and by the difference, learn the extent of the injury. In many instances, no other mode is practicable. In others, the circumstances going to make up the sum of the injury, may be susceptible of being each measured, and in such cases the extent of the injury may be arrived at by a direct process. But this latter mode is seldom practicable, except when distinct pieces of property are an entire loss. To illustrate: if fifty sacks of wheat are set on fire, and twenty rescued uninjured, and thirty burned, the value of the thirty burned would be the extent of the injury; but if all were affected in value by the fire, yet not rendered entirely worthless, the difference between the prior and subsequent value, would alone determine the extent of the injury. In the case of *Sater v. The B. & Mt. P. Plank Road Co.*, we considered the proper mode of arriving at the extent of the injury to land, by taking the right of way over it, and concluded that the more certain way of arriving at correct results, as well as the more easy way, was to regard the value of the land entire, and then, in the condition it would be immediately after the right was carved out, and learn the value of the right of way, or rather the injury, by taking it in this manner. We have seen no good reason for receding

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from the ground then taken. We believe the legislature entertained a similar view, when it provided that these assessments should originally be made on *inspection of the premises*; and we believe, that where juries called on appeal, can have an actual view of the premises, to allow them to do so, will be attended with satisfactory results.

The case stands thus: While the owner of the land is compelled to stand passive, the sovereign power asserts its prerogative, and says to the company, you may pass over this man's land, and enjoy certain defined rights therein, for public use, and no more, provided you first make him compensation. Money is the common measure of value for this land, and the rights you are to acquire. This measure must be applied in the first instance, by the judgment of six commissioners on oath. The proper mode of applying this measure (see opinion of BRONSON, J., in *The Matter of Furman street*, 17 Wend. 649; *Troy & Boston Railroad Co. v. Lee*, 18 Barb. 169; *Canandaigua & Niagara Falls Railroad Co. v. Payne*, 16 Barb. 275), is, to determine the fair marketable value of the premises before the right is set apart, and then again after, and the difference will be the true measure of damage, and when paid, will be in a legal sense, just compensation. The money paid will make the party whole.

This is no chaffering contract. Prudential motives may induce the parties to accommodate themselves to one another, as to the time of taking possession and the like, but in the absence of any agreement, the whole matter is reduced in time to a point. The company may be presumed to be at hand with its money, to tender for the right of way, and its operative force to enter upon construction. The commissioners are on the ground; they ask themselves, what are these premises fairly worth to-day in the market? Again, what will they be worth to-day, after the owner shall have parted with the right which the company are about to acquire? The present values, taking into consideration the extent of the rights conferred, are those which are to be arrived at. The immediate and necessary consequences of parting with the right conferred, must of necessity enter into

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the consideration of the commissioners. The premises, as left in the condition they will then be, together with the money paid, should be equal in value to the premises immediately before the taking. An enumeration of the various circumstances that may enter into any given case, tending to immediately depreciate the value of the premises, by taking the right of way over them, is impracticable. The most we are able to affirm, is, that all the circumstances that immediately depreciate the value of the premises by taking the right of way, are proper to be considered, and none others. Thus, in case the land was before fenced, and by taking the right of way, it is thrown open and left in a manner unfenced, this fact will enter into the consideration, in arriving at the depreciated value of the remaining premises. But it will not do to say, the proprietor will have to fence his land; therefore, he should be allowed some definite price for some particular kind of fence, as a distinct consideration from the depreciation in value of the premises. Much less will it do to say, the consequence of building extra fence, will be to have to keep it in repair, and therefore, a further distinct consideration should be allowed for this. But the sole ultimate consideration is, how is the taking of the right of way to affect these premises to-day in the market? How the road may affect the value of the land, if completed, or any other consideration of future benefit, has nothing to do with the assessment. Neither has any abuse of the privilege, or probability of abuse; for the company only bargained for the legitimate use, and if it goes beyond this, it will render itself liable, when the act is done, and and not until then. Neither is any unwillingness on the part of the owner to allow the road to go over his land, in any manner to affect the assessment. There is a tacit condition attached to the title by which every individual holds his land, that in case it shall be required for public use, it may be taken for its simple value in the market. Or, if a part only is required, for so much as the taking of this part, will affect the value of the premises in the market.

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These considerations will, at once, dispose of all questions of speculative and merely fancy damages.

Believing, as we do, that the court erred in refusing the fifth instruction asked by the company, and consequently in refusing a new trial, the judgment must be reversed. We have not attempted, neither shall we attempt, to review specifically all of the questions made in the cause. But in reference to the admission of testimony, we would remark, that questions were presented in the case of *Sater v. The B. & Mt. P. Plank Road Co.*, which lead to an investigation of the proper mode of bringing the evidence of damage before a jury, called on appeal, where no actual view of the premises can be had by such jury. We then concluded, that it would avoid much of the probability of error, whereby litigation *might* be prolonged, which should always be carefully guarded against, where powerful companies and individuals come in conflict, to permit the witnesses called by the respective parties, on their examination in chief, to speak as to their *opinion* of the *value* of the premises *before and after the taking of the right of way*, leaving the opposite party to the right of cross-examination, to learn the ability of the witness to judge in the premises, and what he takes into consideration in making up his judgment. Although evidence of mere opinion is always unsatisfactory, yet in determining value, that it has to be admitted, from the necessity of the case, is a proposition too well established, to require authority or argument to prove. But these opinions must be confined to the premises over which the right of way is taken. See opinion of DERBY, J., in *Wyman v. Lexington R. R. Co.*, 13 Metc. 316.

Judgment reversed.

McClellan v. McClellan.

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In order to give this court jurisdiction over an appellee, he must be served with notice in some manner, and this service is as essential to give jurisdiction, where there is no voluntary appearance, as it is in the District Court.

When the judgment is against the plaintiff in the court below, in cases where there has been no personal service on defendant, and no appearance made by him, and his residence is still unknown, the Code provides no method for giving notice of appeal.

Under the Code, this court has power, by the establishment of proper rules, to supply defects in the title regulating the organization of this and the District Courts, so as to carry out the general spirit and intent of the system of practice, and make such other rules, consistent with law, as it may deem expedient.

In establishing such a rule, we know of none better than that provided for bringing a party into the District Court, by section 1725 of the Code, where there has been a return of not found.

The appellant must have his notice of appeal returned not found, before he makes his publication.

The notice must be published in a newspaper, as convenient as practicable to the court where the action was commenced, to be determined by the clerk of such court; and should be published for four successive weeks, the last publication to be at least fifteen days prior to the commencement of the term at which the appeal is to be heard.

The same proof and affidavit of the service will be required, as is provided for in similar cases in the District Court, by section 1826 of the Code.

If the appellee is a non-resident, and has an agent or attorney within the state, the notice should be given him, instead of by publication.

Appeal from the Linn District Court.

PETITION for divorce. There was no personal service on defendant, and no appearance made by her in the court below. Publication was made, and the usual affidavit filed, as provided for in sections 1728, and 1826, of the Code. On the hearing, the complainant's bill was dismissed, and from this order he now appeals.

I. M. Preston, for the appellant.

WRIGHT, C. J.—A jurisdictional question arises, and must be first disposed of. The complainant has given no-

tice of this appeal to the clerk of the District Court, who has accordingly transmitted to this court a transcript of the record in the cause. No notice has been given of the appeal to the respondent, by publication or otherwise. The appellant makes suggestion of this position of the case, and asks us to determine whether he shall be allowed to proceed, without further or other notice, and to make such order in the premises, as may entitle him to a hearing in a proper manner, and to serve as a rule, in subsequent cases, where the same question may arise.

The Code, after providing for the different kinds of service in cases originating in the District Court, including that by publication, says, that upon being served with notice in either of the methods heretofore prescribed, the defendant shall be considered in court. Section 1730. In order to give this court jurisdiction, however, over the appellee, he must be served with notice in some manner, and this service is as essential to give jurisdiction, when there is no voluntary appearance, as it is in the District Court. When judgment is against the plaintiff in the court below, when there has been no personal service on defendant, and no appearance made by him, and his residence still unknown, the Code provides no method for giving notice of appeal. In such case, shall the plaintiff be denied his right to be reheard on appeal in this court? Is there no power to supply this defect in the law? We think there is. Under the Code, this court has power, by the establishment of proper rules, to supply defects in the title regulating "the organization of this and the District Court," so as to carry out the general spirit and intent of the system of practice, and such other rules consistent with law, as we may deem expedient. Sections 1589, 1890. To establish a rule or rules, by which a non-resident appellee may have notice of appeal, is certainly not inconsistent with law, but would be carrying out the spirit and intent of the system. A judgment rendered on an appeal, so taken, without appearance, would of course have no greater force or effect, than if rendered in the District Court, upon the same service; and, therefore, the appellant, if successful in this court, would

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occupy no better, or other position, than if he succeeded in the court below.

In establishing such a rule, we know of none better than that provided for bringing a party into the District Court, by section 1725, where there has been a return of not found. The appellant must have his notice of appeal returned not found, before he makes his publication. This publication must be made in a newspaper, published as convenient as practicable to the court where the action was commenced, to be determined by the clerk of such court. It should, also, be for four successive weeks—the last publication to be at least fifteen days prior to the commencement of the term, at which the appeal is to be heard. The same proof and affidavit will be required, as is provided in similar cases in the District Court, by section 1826. Should the appellee, being a non-resident, have an agent or attorney within the state, the notice should be given to him, instead of by publication. section 2498. This cause will be continued, that publication and service may be made, in accordance with the above requirements.

END OF CASES DECIDED AT THE DECEMBER TERM, A. D. 1855.

CASES
IN
Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA;
IOWA CITY, JUNE TERM, A. D. 1856,
In the tenth year of the State.

PRESENT:
HON. GEORGE G. WRIGHT, CHIEF JUSTICE.
" WM. G. WOODWARD, } JUSTICES.
" L. D. STOCKTON,[1]

MILLER v. CHITTENDEN *et al.*

Where a party has actual notice of the existence of a deed, he is affected by it, even though no certificate of acknowledgment is indorsed on the deed.

Where in an action for the partition of real estate, the plaintiff made certain parties defendants, set out their pretended claim to the land, averring that said claim was a cloud upon his title, and prayed for its removal; and where these defendants, in their answer, set up their title, and called upon the

[1] Judge STOCKTON took his seat on the bench on the 4th day of June, being the second day of the term, in place of ISBELL, J., resigned, and whose resignation took effect on that day. The cases of this term, in which opinions were delivered by ISBELL, J., are cases that were argued at the previous term, taken under advisement, and the opinions filed on the first day of this term, before ISBELL, J., left the bench.

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121 88

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plaintiff, as well as other persons, whom they made defendants, to answer as to a cross-bill; and where the parties, without making objection, did so answer, and where the parties subsequently entered into an agreement, that the case should be in all respects as a proceeding in chancery; and where on the hearing of the case in the Supreme Court, it was urged, for the first time, that the *equitable* rights of the parties to the land could not be adjudicated in this action; *Held*, That the objection was made too late.

The first section of the act, entitled, "An act relative to religious societies, approved February 7, 1844, does not limit the *quantity* or *value* of the property that may be held by a religious society, but alone restricts the *purposes* for which it may be acquired and applied.

A grant to trustees, for the use and benefit of a church to be afterwards organized, with no power in the trustees to create the beneficiary, or to appropriate the land, or funds arising therefrom, for any purpose, until such organization, will be upheld so as to pass the title, if such church shall afterwards, within a reasonable time, be so created or brought into existence, as to acquire and hold property, or be the recipients of a charity.

Marshall v. Chittenden et al. (not reported), so far as it holds that the trustees under the deed of J. McK. to C. and others, dated December 25, 1846, after the death of said McK., held the estate for his heirs, overruled.

By the common law, all grants between individuals must be made to a grantee in existence, or capable of taking, otherwise there could be no such thing as livery of seizin.

But this rule does not apply to grants or devises to charitable or benevolent purposes, and especially where the legal estate is vested in trustees, to hold for the use of the contemplated charity.

In such cases, if the intent of the donor can be ascertained, and it be legal, courts of equity will carry it out.

The exercise of jurisdiction by courts of chancery in cases of grants or devises to charities, is not dependent upon the statute of 43 Elizabeth, commonly known as the statute of charitable uses.

In this country, the jurisdiction of courts of equity over charities, must be exercised judicially, and not as a prerogative power.

If the intention of a donor can be legally executed, whether the gift is to a general charity, or to a specific object, it will be done; but if this cannot be accomplished, the claim of the heir will not be defeated, by appropriating the property to another and different object.

The doctrine of *cy pres*, at least in its original form, as administered in the English courts, has no application in this country.

A court of equity will not permit a trust to fail for want of a trustee.

Grants, devises, or dedications to public, pious, or religious uses, from the necessity of the case, form exceptions to the rule applicable to private grants, requiring a grantee as well as a grantor.

It is not necessary in such cases, that the beneficiary should, at the time of the grant, be clothed with the power or capacity of taking the benefit of the donor's bounty; but the intention of the donor will be executed, if this capacity arises within a reasonable time thereafter.

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In the meantime, where the property is in the hands of a trustee, and the object and purpose of the grant look to a future grantee, it will be held in abeyance.

And it is not necessary that the trustee shall have the power to create the beneficiary, or proceed with the execution of the trust before such creation, in order to sustain and uphold such a grant or devise.

Appeal from the Lee District Court.

ON the 25th day of December, 1846, John McKean, being seized in fee of a certain forty acre tract of land, situated in Lee county, made the following deed, which was duly recorded, February 28d, 1847 :

"Know all men by these presents, that I, John McKean, of the town of Keokuk, in Lee county, Iowa, being desirous to promote the cause of true religion in said town, have, in consideration of the sum of one dollar, to me paid by A. B. Chittenden, William Coleman, William F. Telford, Darius Wellington, and Peter Young, of the said town, granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said A. B. Chittenden, William Coleman, William F. Telford, Darius Wellington, and Peter Young, trustees, and to their successors, forever (which said successors shall be elected, chosen, or appointed in the manner hereafter provided), in trust for the uses and purposes hereafter declared, specified, and set forth, forty acres of land situated in Lee county, aforesaid (here follows a full description of the said land), to have and to hold the said forty acres, with all the rights, members, and appurtenances thereof, unto the said Chittenden, Coleman, Telford, Wellington, and Young, trustees, and to their successors and assigns, forever.

"The above conveyance in trust, is hereby declared to be for the use, benefit, and support of an orthodox Congregational church, at the town of Keokuk, aforesaid, to be called and named the Congregational Church of Keokuk; and the said Chittenden, Coleman, Telford, Wellington, and Young, the trustees aforesaid, and their successors, are hereby instructed and enjoined to appropriate the forty acres of land above conveyed, and every part thereof, and all moneys arising from the sale, lease, or rent thereof, or any part

thereof, to the use, benefit, and support of the first orthodox Congregational church which shall be organized at the said town, under the title aforesaid; and until such church shall be organized at the said town, the said trustees shall invest all such moneys, and allow them to accumulate for the benefit of said church, until the period of such organization; and no funds arising from this tract, shall be appropriated to any other object or purpose than that before mentioned, and the reimbursement to the said trustees of their actual outlays and expenses in the execution of the said trust; nor shall the said trustees receive any compensation for their time or services in the execution of their said trust. Three of the said trustees may make and execute valid leases of the premises aforesaid, or any portion thereof, for the purposes aforesaid, for any period not over seven years, but four shall be necessary, and the same shall be sufficient, to sell and convey the said premises, or any portion thereof, or to lease it for a longer term than seven years aforesaid; for all other, the ordinary business of the said trust, the concurrence of three of the said trustees shall be sufficient to render their acts (not contrary to the spirit and tenor of this instrument) valid and binding. In case of the death, removal, or resignation of any one or more of the said trustees, the others shall proceed to make choice of his or their successors, and in all cases of choice to fill any vacancy occasioned by death, or otherwise, it shall be necessary for three, at least, of the surviving or remaining trustees to concur in the choice of the person, or persons, to fill such vacancy, if so many survive or remain, and if less than three remain or survive, then all shall unite in the choice of such person, or persons; and in case of a vacancy by resignation, or removal from the place of any one of said trustees, it shall be lawful for the person so resigning, or removing, to propose his successor, and unless there shall be urgent reasons to the contrary, the others shall make choice of the person so proposed to fill the vacancy.

“Whenever charges shall be preferred or promulgated against any one of the said trustees, seriously affecting or

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compromising his moral character, the others shall call in the aid of three disinterested orthodox Congregational ministers, regularly ordained and laboring as such, who shall, with the other trustees aforesaid, constitute a board or council for the investigation of the said charges; and if, after having given the accused party a fair hearing in his own defence, three of the said trustees, and two of the said ministers, shall concur in the opinion, that the said accused party is unfitted, by reason of moral delinquency, to discharge the duties of the trust hereinbefore declared and created, it shall be the duty of the said trustees to remove or expel the said trustee, and to make choice of some suitable person in his place. In all cases of the removal or expulsion of any of the said trustees, and in all cases of the choice of any person, or persons, as trustees, a statement of the fact of such choice or removal shall be made in writing, and signed by all the remaining or surviving trustees, or so many of said trustees as shall have concurred in such choice or removal, which said statement shall be deposited with one of the said trustees, who shall act as their secretary; and copies of said statement shall also be furnished to such other of said trustees as may require it, which copies shall also be signed by the other trustees, the same as the original statement. Finally, it is earnestly enjoined upon said trustees, that, in the execution of the said trust, they shall avoid all strife, bickering, and disputes—all personal and party prejudices and animosities, and all selfish objects; and that they exercise towards each other, in all matters connected with the said trust, the greatest charity, kindness, and forbearance. In witness whereof, I have hereunto set my hand and seal, this 25th day of December, A. D. 1846. John McKean, [seal]." And then follows the following certificate of the acknowledgment of said deed:

"*Territory of Iowa, Lee County, ss.*:—On this 25th day of December, John McKean came before me, and personally acknowledged that he executed the foregoing deed; and I do certify that I know the said John McKean, who made the said acknowledgment, to be the same person described in, and who executed the said deed. Given under my hand

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this 25th day of December, A. D. 1846. Jesse Hough, justice of the peace of said county." And on the same day, the said trustees mentioned in said deed, accepted said trust, as appears from the following indorsement thereon: "We, the undersigned, trustees named in the within deed of trust, do hereby accept the said trust therein declared and created; and we do further undertake and agree to execute and perform the duties of the said trust, according to the true tenor and effect of the said deed. Dated Keokuk, December 25th, A. D. 1846. A. B. Chittenden, William Coleman, William F. Telford, Darius Wellington, Peter Young."

On the 23d day of February, 1847, the said John McKean made and executed his last will and testament, in which he gives and bequeaths certain parcels of real estate to his executors, therein named, to be held in trust for certain children of him, the said McKean. This will recites, in substance, that these lands are to be conveyed to these children at the expiration of ten years from the date thereof, provided the said children should continue during that time, to live a prudent, moral, and virtuous life, of which the said executors, or their successors, were to be the sole judges. If, however, either of said children should become vicious, depraved, or abandoned, then the said executors were required, at the expiration of said ten years, to convey the portion to which such child would have been entitled, to the same persons mentioned in said deed of December 25th 1846, or their then successors in office, for the same use and purposes as in said deed mentioned, to wit: for the benefit and support of a Congregational church at Keokuk.

McKean died in a short time after executing this will, leaving a widow and several heirs. In August, 1849, the widow and four of the heirs sold their interest in the tract of land mentioned in said deed of December 25th, 1846, to Samuel T. Marshall, one of the defendants. Afterwards, in the years 1852 and 1853, Lewis R. Reeves, by two several conveyances from other heirs, became interested in the same property. In March, 1853, Reeves sold a portion of his interest to Samuel F. Miller, the plaintiff, who, on the same

day, commenced this suit, making Marshall and his grantees, Reeves, such heirs of McKean as had not sold their interest, and the then trustees of said Congregational church, parties. In his petition, he sets forth the respective interests of the parties to this land; that the said trustees claim to hold the legal title to the entire tract, in trust for the church, under the deed above recited; but that said deed is of no validity, but is a cloud upon his title, which he seeks to have quieted; and he also asks a partition of the said land among the owners, according to their respective rights. To this petition, there were various answers, and supplemental answers, both on the part of Marshall and his grantees, and the trustees of the church, and replications taking issue thereon. The trustees, in their answer, set up their title under said deed; deny that plaintiff, or the other defendants, have any right or title thereto; pray that their title may be quieted; and call upon the plaintiff, and all the other defendants, to answer the same, as to a cross bill. This answer is thus responded to, the issue being distinctly made on the validity of this deed; and during the preparation of the case for hearing in the court below, the parties agreed in writing, that it should be treated in all respects as a proceeding in chancery. When this deed was executed, and at the time of McKean's death, there was no orthodox Congregational church known or organized in Keokuk. There were, however, several persons, including the trustees, residing there, who belonged to this denomination. About the year 1850, many of these persons united themselves temporarily with the Presbyterian church of that city, that church having so modified its discipline as, in the language of one witness, "to make it substantially a Congregational church." These persons, and others who did not thus connect themselves, frequently expressed their intention of organizing a church, so soon as their numbers and means were sufficient to enable them to sustain the same; and at no time does this intention appear to have been abandoned. In July, 1854, the Congregational church of Keokuk was organized, which fact is set up in a supplemental pleading, filed herein

by the trustees. The evidence also tends to show, that the trustees took possession of this land immediately after McKean's death, and rented a part of the same for various purposes, and that this possession, and the existence of this deed, were then and afterwards generally known in Keokuk, where the grantees of the McKean heirs then resided. In 1849, Marshall filed his bill in chancery against the said trustees to set aside said deed, which, after being decided in his favor, on appeal in this court, on a demurrer to the bill, is now pending in the Lee District Court. On this state of facts, the court below decreed a partition of this land, and held the said deed from McKean to the trustees to be of no validity, from which decree the said Chittenden, and the other trustees, now appeal.

James S. Love, for the appellants, filed the following argument:

The first proposition which we maintain is, that the jurisdiction of courts of chancery in cases of charity, existed at common law, before the statute of 43 Elizabeth, and that it was not derived from that statute. There was formerly much diversity of opinion among courts and jurists, as to the sources of this jurisdiction; some maintaining that it was derived wholly from the statute in question, and others, that it existed at common law, independent of the statute. This question, however, was put to rest by the investigation in the case of *Stephen Girard's Will*, 4 Wheat. 7. Since that decision, the courts of Maine, Vermont, Massachusetts, New York, Pennsylvania, New Jersey, Ohio, Indiana, Kentucky, North Carolina, South Carolina, Georgia, Alabama, and Tennessee, have emphatically declared that this jurisdiction was inherent in the Court of Chancery, and not derived from any statute. To the voice of the judiciary, may be added that of every American author who has written upon the law of charities, since that day. Story, in the 6th edition of his *Commentaries*, (§ 1454,) acknowledges his own previous error upon this subject, and his change of opinion, under the new lights reflected upon the subject by the dis-

cussion and decision in the Girard Will case, and several recent English cases. See Story Eq. (6th ed.) § 1153.

The great Chancellor KENT had already, even before the decision in the Girard Will case, given his potential voice in favor of the inherent, and necessary jurisdiction of the court, irrespective of any statute whatever (2 Kent's Commentaries, 286), and his son, in a learned note to the 6th edition, after a full review of the authorities, declares that the decision in that case had "left the fact" of the jurisdiction prior to the statute, "indisputable," and "closed all further discussion and controversy on the subject." 2 Kent's Com. 288. To the same purpose is the view of Willard; Willard's Eq. 570. It would be quite useless to go further in this place, into a review of the authorities in support of a proposition which no longer admits of serious dispute. As we proceed, the court will discover an irresistible current of authority in the American courts, in support of our position.

The chancellor exercised jurisdiction of the whole subject of charities at common law, but his jurisdiction was nevertheless twofold. In one class of cases he interposed as delegate of the crown, exercising the king's prerogative, as *paterfamilias*, under the king's sign manual. In another class of cases, he gave relief in his judicial capacity, and by virtue of his inherent power, as an equity judge. In the former cases, the attorney-general was a necessary party; in the latter, he was not a proper party. It is, perhaps, impossible to draw a line which would exactly distinguish one class of cases from the other. The two jurisdictions being exercised by the same officer, were not, it may be supposed, always kept perfectly distinct, but became very frequently interwoven, so as scarcely to be distinguishable at all.

In general, it may be safely affirmed, that the chancellor acts judicially by virtue of his inherent powers as judge in equity, where his duty consists in ascertaining the intentions of the donor of the charity, and in carrying those intentions into effect. But when the terms of the donation are such, that the objects of the charity are too vague and indefinite

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to be ascertained by the ordinary rules of construction; or where the object is unlawful or impossible to be attained, the arbitrary power of the chancellor, as delegate of the king's prerogative, must be invoked. To ascertain the intention of the parties to a grant or devise, and to carry that intention, if lawful, into effect, is a judicial act; but to direct the application of property to some object of charity prescribed by the court, when no object is pointed out in the grant or devise, or the object designed by the party is unlawful or superstitious, or so vague and indefinite that it cannot be attained, is an arbitrary power, requiring for its exercise the application of the extraordinary doctrine of *cy press*. It is a power rather legislative than judicial. It was exercised in England by the crown, on the principle that it was the prerogative of the king, to take care of those of his subjects who were incompetent to protect their own rights. Hence the king, as *parens patriæ*, was guardian of idiots, lunatics, and infants, and the disposer of the class of vague and indefinite charities in question. A great number of cases might be cited, illustrative of the class of charities thus falling within the scope of the prerogative powers of the court, but as we do not, in the case at bar, invoke the aid of this power, it will be unnecessary to do more than refer to the books in which they are collected and illustrated. See Story's Equity, 1166. A few illustrations may be given: Thus, where a man devised a sum of money to such charitable uses as he should direct by the codicil of his will, or by note in writing, and he afterwards left no note or codicil, it was held, that the court would dispose of it to such charitable purposes as it should think fit. Story's Equity, 1167. Again: A bequest of money to found a Jew's synagogue, which was against the policy of the law, was enforced as a charity, and transferred to the benefit of a foundling hospital! *Ib.* 1168. And where the literal execution becomes inexpedient or impracticable, the court will execute it as nearly as it can. Thus, a bequest for the redemption of British slaves in Turkey and Barbary, was applied *cy press*

to other objects of charity, there being no British slaves in Turkey and Barbary to redeem. Ib. 1170.

It is quite obvious that the power by which a court carries into execution charities of the kind just mentioned, is arbitrary, not judicial. As the case at bar does not require the exercise of any such discretion in the chancellor, I refer to the foregoing examples, merely for illustration, and for the purpose of showing with what extraordinary favor, charities have been received in the English courts. On the other hand, where the intention of the donor is clear, and the object of his bounty definite and lawful, more especially where that object is highly beneficial to society, it would seem most strange, if the judicial department of the government were so defective in its organization, as to be destitute of the power of executing the charity.

It is not the purpose of this argument, to lay down any general principle upon which all the authorities may be reconciled. Indeed, any such attempt, here, would be as futile as it is unnecessary. It may, however, be affirmed, upon the authorities, both English and American, that, whenever the property is vested in trustees competent to take the same, and a lawful object of charity is pointed out, the chancellor will uphold the donation in his judicial capacity as equity judge, irrespective of any statute. There is, indeed, an irresistible current of authority, both in England and America, which would justify me in going far beyond the proposition here asserted. In England, it is well known, that charities are so highly favored, that the chancellor will sustain them in almost every case, where a general charitable purpose appears, although there may be no trustees to take the property, nor any beneficiaries *in esse*, nor any object of the donor's bounty pointed out, or in existence. But, whilst many of the American courts have rejected the doctrine of *cy press*, which has enabled the English courts to assume this extensive jurisdiction, there is, in this country, an irresistible current of authority in support of the proposition, that even where no trustees capable of taking the trust, are interposed, and no persons are *in esse* in whom the beneficial

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interest can vest, yet, if a lawful object of charity be pointed out, and that object is beneficial to society, the donation will be supported and upheld. It will be seen by the court, as we proceed, that the proposition just stated has been acted up in a very large majority of American cases. But it is not necessary for us, in the case at bar, to establish so comprehensive a proposition. It will be quite sufficient for our purpose, to maintain the less extensive principle affirmed above.

The right of property involves the right of giving it for the support of any object, beneficial to society, and not obnoxious to the rules and principles of law. Trusts are peculiar objects of chancery jurisdiction. What reason, therefore, can be assigned, why a court of chancery should not act judicially in compelling trustees to apply property to a definite object of charity, specified in the instrument, by which they hold the property? What is there arbitrary or prerogative, or extra-judicial, in the exercise of such a power? In 2 Story's Equity (§§ 1154, 1155), we find the following: "These facts and circumstances, did certainly seem to afford a strong presumption that the jurisdiction of the court to enforce charities, *where no trust is interposed*, and no devisee is *in esse*, and where the charity is general and indefinite, both as to persons and objects, mainly rests upon the constructions of the statute of Elizabeth. And accordingly, that conclusion was arrived at in a very important case in the Supreme Court. Since that time, however, the subject has undergone a more full and elaborate discussion, both in Great Britain and America." After reviewing the "more elaborate" consideration referred to, by Lord ELDON, Sir JOHN LEACH, Lord REDESDALE, and Lord Chancellor SUGDEN, Mr. Story, in section 1154, proceeds: "But the most authentic, and, at the same time, the most satisfactory information upon the whole subject, is to be found in the Report of the Commissioners upon the Public Records, published by Parliament, in 1827. From these most important documents, it appears, by a great number of cases, previous to the statute, that cases of charities, where there were trus-

tees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to and acted upon in the Court of Chancery." The author, in the next section, refers to the *Girard Will Case* (2 How. 1), and says: "In this case, the court held that there was a jurisdiction in chancery, *over charitable trusts*, antecedent to the statute of Elizabeth, and that, although the statute was never in force in Pennsylvania, yet that the common law of that state had always recognized the chancery jurisdiction in cases of charity." Even "where no trust is interposed, and where there is no person *in esse* capable of taking, and where the charity is of an indefinite nature," it seems to be the better opinion, that the jurisdiction of the court is to be referred to its general equity powers anterior to the statute. *Ib.* 1162. See, to the same effect, still more emphatically, sections 1187—1191.

LORD EDEN, in *Moggridge v. Thackwell*, 7 Vesey, 36, after a full review of all the cases, came to the conclusion (which says Judge STORY, § 1190, is now the settled rule), that where there is a general indefinite purpose of charity, not fixing itself upon any particular object, the disposition and administration of it, are in the king, by his sign manual. But where the gift is to trustees, with general objects, or some particular objects pointed out, there the Court of Chancery will take upon itself the administration of the charity, and execute it under a scheme, to be reported by the masters. Thus, it appears, that in England, it never was doubted that where trustees were interposed, and some objects of charity, general or particular, were pointed out, a charitable trust was created, and the jurisdiction of the court attached, independent of the prerogative of the crown. The doubts and conflicts of authority there, grew out of charities where no trust existed, and the objects were either not in existence at all, or wholly indefinite, or against the policy of the law, or absolutely unattainable.

If we turn to the American authorities, we shall find them not less explicit, in support of the principle we are now endeavoring to maintain. Thus, in the case of *Carter and wife*

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v. *Balfour's Administrators*, 19 Alabama, 821, the bequest was to the Baptist societies for foreign and domestic missions, and to the American and Foreign Bible Society. The bequest was sustained by the court, in an able judgment. Now, this was a case where there were no trustees capable of taking, and no persons in whom the beneficial interest could possibly vest. The objects of the charity, though not certain on the face of the will, could be ascertained by reference to the constitution, &c., of the voluntary societies. This, therefore, is a much stronger case than the one at bar. The subject has been most ably and learnedly discussed by the Supreme Court of North Carolina, in several cases. *Griffin v. Graham*, 1 Hawk. 97; *Thomas White's Executors v. The Attorney-General, and the Trustees of the University*, 4 Iredell, 19. In South Carolina, this question has been adjudicated, under remarkable circumstances, in the case of *The Attorney-General v. John A. Jolly*, 1 Richardson's Eq. 105, and 2 Strob. Eq. 397; in which case, the bequest was: To the testator's wife for life, and after her death, to the Methodist church of which she should be a member at the time of her death, to be appropriated to the uses and purposes which the conference should deem most advantageous for said church, more especially for the support of Sunday schools, for the purchase of bibles and religious tracts, and the distribution of the same among the destitute, and for the support of missionaries. So in Georgia. *Catharine E. Beall and others v. The Surviving Executors of John Fox*, 4 Geo. 404. So, likewise, in Kentucky. *Moore's Heirs v. Moore's Devisees*, 4 Dana, 354; *Attorney-General v. Wallace*, 7 B. Monroe, 611; *Curling's Administrators v. Curling's Heirs*, 8 Dana, 38. So in Maine. *The Proprietors of the Town of Shapleigh v. Pillsbury*, 1 Greenl. 271; *Jonathan Sewell, jr. v. Charles Cargill*, 15 Shepley, 414. In Mississippi. *Isaac R. Wade and others v. The American Colonization Society*, 7 Smedes & Marshall, 663. In Pennsylvania. *Brown v. Hummel*, 6 Barr, 86; *Witman v. Lex*, 17 Sergt. & Rawle, 88; *Terrence McGirr v. George Aaron*, 1 Penn. 49; *Wright v. Linn*, 9 Barr, 433; *Pickering v. Shotwell*, 10 Barr, 23. The same in

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Vermont. *Luther Stone, jr. v. Executors of Anni Fuller and Benjamin Griffith*, 3 Vermont, 400; *Executors of Joseph Burr v. Richard Smith and others*, 7 Vermt. 241. In Tennessee. *Green v. Allen*, Dec. T. 1844; *Dickson and others v. Montgomery and others*, 1 Swan, 349.

The doctrines we maintain, have been firmly and emphatically upheld in the great state of New York. In the case of *Coggeshall and others, Trustees of New Rochelle v. Pelton and others*, 7 Johns. Ch. 292, the devise was: "I give, &c., to the town of New Rochelle, \$1,200 for the express purpose of building a town-house in said town, for transacting town business, which sum I direct my executors, to pay unto such persons as the town shall appoint to receive it, at a legal town meeting." The chancellor (KENT) upheld the bequest as a valid charitable devise. See, also, *McCartee v. Orphan Asylum*, 9 Cowen, 439. The devise was, "to the Orphan Asylum Society of the city of New York, to be applied to the charitable purposes of the institution." In the case of *The Ministers, Elders, and Deacons of the Reformed Protestant Dutch Church v. Verder*, 4 Wend. 494, the court held: "That, where a grant is made to individuals for the use of a church, which, at the time of the grant, is not incorporated, as such, the persons to whom the grant is made, stand seized to the use; and when the church afterwards acquires a legal capacity to take and hold real estate, the statute executes the possession to the use, and the estate vests." In the case of *Potter v. Chapin*, 6 Paige, 649, WALWORTH, Chancellor, says: "The facts show conclusively, that the fund raised for the purpose of erecting a school-house, was dedicated to the inhabitants of the village for that purpose, as a donation or gift to a public charity. Although some doubt was thrown upon the question of charitable donations, for the benefit of a community or body, not incorporated so as to be capable of taking and conveying the legal title to property, by the decision of the Supreme Court in the case of *The Baptist Association v. Hart's Executors*, 4 Wheat. 1, I believe it is generally admitted that the decision in that case was wrong. And it may now be considered an

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established principle of American law, that the Court of Chancery will sustain and protect such a gift, bequest, or dedication of property to public or charitable uses, provided the same is consistent with the local laws and public policy, where the object of the gift or dedication is specific, and capable of being carried into effect, according to the intention of the donor."

In *The Reformed Protestant Dutch Church in Garden Street v. Mott and others*, 7 Paige, 77, the facts were as follows: In 1791, S. Bayard conveyed the premises to S. Van Courtland and others, in fee, for the purpose of having a church or suitable building erected thereon, for the common use of the ministers and elders, &c., of the Low Dutch Church, which then were, or at any time thereafter should be, within the city of New York, professing the canons of the National Synod of Dort, &c. The court held, that: "The conveyance was unquestionably valid, as a charitable use, &c., and that the court, independent of the statute of Elizabeth, relative to charitable uses, which was never acted upon in New York, had an original jurisdiction to enforce and compel the performance of the trust." The same doctrine was maintained, in *Kniskern and others v. The Lutheran Churches of St. Johns and St. Peters*, 1 Sandf. Ch. 439, where "a grant of lands was made in 1789 to the trustees of an evangelical Lutheran congregation, consisting of two churches, for the common use and benefit of the said Lutheran congregation, forever." The same view of the law, was held by the court, in *Shotwell's Executor v. Mott et al.*, 2 Sandf. Ch. 46. Here the bequests were to trustees, "That the interest thereof may be distributed and divided annually, forever, under the direction of the New York yearly meeting of friends called orthodox, among such orthodox ministers of such society in limited and straightened circumstances, especially those who travel in the ministry, as the said meeting, or its committee, shall for that purpose name and designate;" and "for the relief of such indigent persons residing in the township of Flushing, as the trustee or trustees for the time being, shall select for that purpose," &c. Such was the current of authority in

the state of New York, until the case of *Ayres v. The Methodist Church*, 3 Sandf. 351, and the case of *Andrew v. New York Bible and Prayer-Book Society*, 4 Sandf. 157, arose in the Superior Court of the city of New York. In the former case, the devise was to the trustees of the Methodist Episcopal Church in the city of New York, and their successors in office, of the lands described, in trust, to receive and apply the rents, &c., to the support of one or more worthy and moral persons, of the age of sixty years and upwards, every one of which aged persons shall live in a town or village, where there shall be at least one place or house, or place of public worship, &c. Held by the court: 1. That the religious society could not take the lands by devise, &c. 2. That although the Court of Chancery in this state, may have succeeded to the jurisdiction of the English chancellor in regard to the execution and administration of charities in general, it did not succeed to the execution of charities of which the purpose is indefinite, and not fixing itself, with certainty, upon any object, and which in England, therefore, belonged to the king as *parens patriæ*. 3. That a devise, therefore, to a corporation, not capable of taking by devise, in trust, to apply the rents to aged persons, not designated by class, or otherwise than residents in a place where there should be a house of worship, cannot be executed by chancery, and is illegal and void, &c. This case was decided by Judge DUER, and it was soon followed by his decision in *Andrews v. New York Bible Society*, in the same spirit. As this last decision was reversed in the Court of Appeals, upon full discussion, and inasmuch as it is fully stated and discussed in Willard's Equity, a recent and able work, I need not further consider it here.

The foregoing decisions evidently influenced, to some extent, the judgment of the Supreme Court of New York, in *Yates v. Yates*, 9 Barbour, 339. That decision was, however, based mainly upon the provisions of the Revised Statutes. WRIGHT, J., in delivering the opinion, says: "The better opinion seems to be, that independent of the statute of charitable uses, the English courts of equity possessed and

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exercised an inherent jurisdiction over charitable trusts," &c. It is, however, unnecessary to dwell upon these decisions, since in the cases of *Williams v. Williams*, and *Andrew v. New York Bible and Prayer-Book Society*, the New York court has settled the law in that state, as we claim it to be. See Willard's Eq. tit. Charities, 594. In Massachusetts, the cases have been, if possible, still more explicit in support of the doctrines we maintain. Without adverting to the older cases, some of which are referred to in *The Proprietors of Shapleigh v. Pillsbury*, 1 Greenl. 271, it will be sufficient to cite the late cases of the courts of that state. In the case of *Burband v. Whitney*, 24 Pick. 146, the court sustained as a valid devise to charitable uses, the following bequests: "To the American Bible Society, to the American Education Society, to the American Colonization Society, and to the American Home Missionary Society, I bequeath \$4,000, or \$1,000 to each society, to be retained as a fund, or expended immediately, as the societies shall judge best calculated to promote the intended objects," &c. Some of said societies were incorporated, others, not; and their objects were various, for which, see statement of the case. This subject was also before the court in Massachusetts, in *Hadley v. Hopkins*, 14 Pick. 240. In *Hubbard Bartlett and others v. Laura Nye and others*, 4 Metcalf, 378, the devise was of real and personal estate, to the American Board of Commissioners for Foreign Missions, and to the American Bible Society; and it was averred in the bill, and admitted by the demurrer, that "the American Bible Society, at the time of the death of the testatrix, and of the probate of the will, was a voluntary association, established for good, benevolent, and charitable purposes, and not a society established by law." The court, in their judgment, sustain the charity, and cite and approve the observations of WALWORTH, Chancellor, in *Potter v. Chapin*, 6 Paige, 649, quoted above.

In *Washburn v. Sewall and others*, 9 Metcalf, 280, the devise was to the "Concord Female Charitable Society, in New Hampshire," and it appeared by the answer, that an unincorporated society existed in New Hampshire, corre-

sponding in name with the description of the devisee in the will; that said society numbered nearly one hundred members; that its objects were to provide groceries for the sick and infirm, clothing and fuel for the helpless and needy, &c. The court sustained the bequest as a charitable donation, saying, among other things: "In cases of charitable gifts, it is no objection to their validity, that no person is named capable of taking the legal interest." In *Brown v. Kelsey and others*, 2 Cushing, 244, the bequest was, "for the promotion of such religious and charitable enterprises, as shall be designated by a majority of the pastors composing the Middlesex Union Association." The pastors composing said association, held a meeting, and made the following appointments: "To the Orthodox Congregational Society in Shirley, the annual income of the homestead of the testatrix." The remainder of the estate, both real and personal, to "The American Board of Commissioners for Foreign Missions, two-fifths; to the Massachusetts Home Missionary Society, two-fifths; to the American Home Missionary Society, one-fifth." The court sustained the bequest. Finally, in *Winslow v. Cummings and others*, 3 Cushing, 359, this subject was before the Supreme Court of Massachusetts, and that court not only sustained our positions, but went far beyond what is necessary to the support of our case.

In Ohio, the subject of charities has been most ably discussed, and the view we take emphatically asserted. In the *Trustees of the McIntyre Poor School v. Zanesville Canal and Manufacturing Company*, 9 Ohio, 203, LANE, C. J., says: "It is admitted, that such a bequest as this would be sustained in England. However uncertain the object; whether the person to take be in *esse* or not; whether the bequest can be carried into exact execution or not; when the general charitable intention is clearly manifested, a court of equity will sustain the legacy, and give effect to it, in some form, upon principles of its own. But it is asserted by the counsel for the heirs, that this wide-reaching jurisdiction is peculiar to England, and depends upon the statute of Elizabeth only. We would not, unnecessarily, enter into the

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much disputed and greatly perplexed inquiry, as to the extent of chancery jurisdiction over charities, independent of the statute. But one of the earliest elements of every social community, thrown upon its lawgivers at the dawn of its civilization, is adequate protection to its property and institutions, which subserve public uses, or are devoted to its elevation, or consecrated to its religious culture and its sepulchres; and, in a proper case, the courts of our state might be driven into the recognition of some principle analogous to that contained in the statute of Elizabeth, as a necessary element of our jurisprudence. But without reference to these considerations, where a trust is plainly defined, and a trustee exists capable of holding the property, and executing the trust, it has never been doubted, that chancery has jurisdiction over it, by its own inherent authority, not derived from the statute, nor resulting from its functions as *parens patriæ*.

"The property, devised in this case, consisted of land, personalty, and stock in the Zanesville Canal and Manufacturing Company, the legal ownership of which was either in McIntyre's heirs or executors. The condition on which the devise took effect was, the death of the daughter, without issue. The objects of the testator's bounty were the poor children of Zanesville, and the benefit intended was their education. There is no doubt that a trust attached to the property, whoever might hold it; for whenever a person, by will, gives property, and points out the object, the property, and the way it should go, a trust is created. And a bequest of land to A., to construct an asylum for aged sailors, although inefficacious to pass the legal title, sufficiently defines the trust, and charges the heir with its performance. 3 Pet. 119; 1 Story's Eq. 415; 4 Wheat. Appendix. The position, therefore, taken by the heirs, that the land descended to them on the death of the daughter, absolved from the trust, is not supported, but overruled." The same matter was again before that court, in *The Zanesville Canal and Manufacturing Company v. The City of Zanesville*, 20 Ohio, 488, where it was held: 1. "That a gift to a

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charitable use is to receive a most liberal construction. 2. That the McIntyre fund, given to establish a school in the town of Zanesville, for the poor children in said town, is not limited in its benefits to the parents of children residing in that locality which constituted the town corporate of Zanesville, at the decease of the testator. 3. That the charity will be administered for the benefit of the poor children in the town of Zanesville, according to the most general and popular sense of the term.

Finally, in *Umrey's Executors v. Levi Woodin and others*, 1 McCook, 161, this subject came up for adjudication again. The devise was: "To the poor, needy, and fatherless, of Jefferson and Madison townships, of the county aforesaid: to such poor as are not able to support themselves, to be divided as my executors may deem proper, without any partiality." After referring to the statute of 43 Elizabeth, the court say: "But inasmuch as that statute is not in force here, it is hence inferred, that our courts have no such power. This consequence by no means follows. On the contrary, many of its principles have long since been incorporated into American jurisprudence, and enforced by the decisions of the highest and most enlightened courts." The judge here cites and approves of *Wilman v. Lex*, 17 Sergt. & Rawle, 88; *Ingliss v. The Sailor's Snug Harbor*, 3 Pet. 99; *Moore's Heirs v. Moore's Devisees*, 4 Dana, 355; *Trustees of McIntyre Poor School v. The Zanesville Canal & Manufacturing Company*, 9 Ohio, 287. In this case, the property is, by will, expressly vested in the executors, and they are made trustees to apply the fund, from time to time, to relieve the necessities of the poor and needy in the townships named. The trustees exist, to take and hold the property, and they are charged to seek out, and apply it to the objects of the testator's bounty. These objects are as clearly pointed out, as the nature of the case will admit, and as little as possible left to the discretion of his trustees.

The whole subject of charities, was ably discussed by the Supreme Court of Indiana, in the case of *McCord v. Ochiltree*, 8 Blackf. 15. The devise was to "the Theological

Seminary at South Hanover, in the state of Indiana, all the remainder of my estate, to continue a permanent fund, and the interest to be applied to the education of pious, indigent youths, who are preparing themselves for the ministry of the gospel, and those only who strictly adhere to the Westminster confession of faith, in its literal meaning." The said seminary, at the death of the testator, was an unincorporated association, and it was held, that the bequest was void at law, because the objects of the testator's bounty are too vaguely indicated, to enable them to take the legacy, without the interposition of a trustee, and because there was, at the death of the testator, no existing trustee capable of executing the trust, intended to be created by the will. The courts of equity of this state possess the power, in addition to the usual jurisdiction of a court of chancery, of taking cognizance of, and protecting the rights and property of infants, idiots, and lunatics, and of superintending and enforcing charities. The principles of the statute of 43 Elizabeth, chap. 4, commonly called the statute of charitable uses, with one or two exceptions, have been adopted, and are in force in this state. Such a bequest as that above mentioned, though void at law, will be enforced in equity, as a charity, both in reference to said statute of Elizabeth, and to the law of charities, independent of that statute.

In considering the cases in the Supreme Court of the United States, it is necessary to advert to what is said by that court, in *Wheeler v. Smith*, 9 How. 78, the result of which is, that in deciding questions involving titles to land, that court will follow the decisions and laws of the state courts. Upon this principle, the case of *Wheeler v. Smith*, was decided under the laws of Virginia.

The case of *The Baptist Association v. Hart's Executors*, 4 Wheaton, 1, is not in point here. 1. Because there were no trustees capable of executing the trust; 2. Because there was no definite object of charity. The objects of the charity were evidently intended to be selected and appointed by the trustees. The object was for the "education of youths of the Baptist denomination, who *should appear promising for*

the ministry." The charity did not fix itself upon any particular class of individuals. It was left to the trustees to determine what particular youths should appear "promising for the ministry," and, as the trustees appointed were incompetent to take the trust, and to make the appointment, there was no means provided of making that certain, which was, in itself, wholly indefinite and uncertain. The Court of Chancery could have done nothing but appoint a trustee to take the property, and carry out the will of the testator. This could not be done, without utterly contravening the will of the testator; for he had appointed the Baptist Association, and committed to them the duty of making the selection. It was a special confidence and trust, reposed in them by the testator. It was not his will, that any other person or persons should select the objects of his bounty. Now, the court could not authorize the Baptist Association to hold the property, and perform the trust, because they were, in law, incompetent. Neither could the court appoint any other trustee, because that was not the will of the testator. There was no one to be called to account for the non-fulfillment of the trust, and no ascertained object, to which the testator's bounty could be applied by the court.

The case at bar is, in all these respects, wholly different. There were, at the time of the conveyance, trustees capable of taking and holding the property, and performing the trusts. The objects of the bequest were fixed, definite, and certain, though future, which we have seen, is no objection to the validity of the grant. Now, what is the principle decided by the court in the case last cited? It is this, in the very words of the court: "*Charitable bequests, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, cannot be established by a court of equity, either exercising its ordinary jurisdiction, or enforcing the prerogative of the king as parens patriæ, independent of the statute of 43 Elizabeth.*" In the case at bar, there is a legal interest vested, clearly. There is, also, an existing organization, capable of receiving the beneficial interest. There were, indeed, many other

principles laid down by Chief Justice MARSHALL, in the course of his opinion, but they were out of the case, as he, himself, expressly admits, at the close of his argument. It is true that the chief justice in that case, affirms that there was, in England, no jurisdiction over the subject of charities of the kind then in question, prior to the statute of 43 Elizabeth, and that the jurisdiction referred to, resulted from that statute; and such was the prevailing opinion of some courts and authors, at that day, and, indeed, up to the time when the case of *Vidal v. Girard's executors*, 4 How. 127, was discussed and decided in the Supreme Court of the United States. It is almost unnecessary to add, that this view of the jurisdiction of courts of chancery, is now universally admitted to have been erroneous. Beside the emphatic admission of Mr. J. STORY, in the Girard Will case, and the overwhelming current of authority in the state courts, since the last-named case was decided, we have the declaration of the present chief justice of the United States, in *Fountain v. Ravenal*, 17 Howard, 369, to the same effect.

The decision in the case of *The Baptist Association v. Hart's Executors*, seems to have proceeded mainly upon the fact that the statute of 43 Elizabeth, had been repealed in Virginia. Now the fact of its repeal, implies that it had once existed, and during its existence, it must have been regarded as the law of charities in that state. By the act of repealing it, the legislature certainly disapproved of, if they did not abrogate, the law of charities in Virginia. Indeed, it seems impossible to avoid the conclusion that the repeal of the statute, left that state without any law of charities; for the statute of 43 Elizabeth, defined what should thereafter be considered charities, and in this, as we contend, it but affirmed the common law. Now, the repeal of the statute, without any re-affirmance of the common law on that subject, might well be considered a total abrogation of the law of charities, as known at common law. Hence the case of *The Baptist Association v. Hart's Executors*, can have no authority in Iowa. I do not know that the case itself has been overruled; nor is it important to my purpose to show

that it has been; but the assertion of the chief justice, that the jurisdiction of courts of chancery was derived from the statute 43 Elizabeth, has been denied and utterly refuted, not only in his own court, but in a great many of the American state courts, as we have seen from the cases cited and read to the court. The case itself, not being in point here, and the position it assumes in relation to the jurisdiction of the court having been overthrown, it can carry no authority in the decision of the case at bar. The subject of charities has been frequently discussed in the Supreme Court of the United States, since the decision in *The Baptist Association v. Hart's Executors*, and from that time until the adjudication in *Vidal v. Girard's Executors*, 2 How. 128, there has been a constant struggle to disengage the court from the embarrassing assertion of Chief Justice MARSHALL, in relation to the source from which the jurisdiction of the court is derived. Thus in the case of *Beaty & Richey v. Kurts and others*, 2 Peters, 566, there is an evident attempt by Judge STORY to place the decision on special grounds, without much apparent success. In this case, a lot of ground had, in the original plan of an addition to Georgetown, been marked "for the Lutheran Church." The bill was filed for an injunction and to quiet title, by Kurts and others, trustees of the German Lutheran Church of Georgetown, against the heir at law of the town proprietor. The church was a voluntary association at the time of the filing of the bill. Mr. Judge STORY says: "As to the first named question, it is not denied that Charles Beaty did originally intend that this lot should be appropriated for the use of a Lutheran church in the town laid off by him. But as there was not, at that time, any church, either corporate or unincorporated, of that denomination in that town, there was no grantee capable of taking the same, immediately by grant. Nor can any presumption of a grant arise from the subsequent lapse of time, since there never has been any such incorporated Lutheran church there, capable of taking the donation. If, therefore, it were necessary that there should be a grantee legally capable of taking, in order to support the dona-

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tion in this case, it would be utterly void at law, and the land might be resumed at pleasure. If the appropriation, therefore, is to be deemed valid at all, it must be upon other principles than those which ordinarily apply between grantor and grantee. And we think it may be supported as a dedication of the lot to public and pious uses. The bill of rights of Maryland, gives validity to any 'sale, gift, lease, or devise, of any quantity of land not exceeding two acres, for a church, meeting-house, or other house of worship, and for a burying-ground, which shall be improved, enjoyed, or used only for such purpose.' To this extent, at least, it recognizes the doctrines of the statute of Elizabeth for charitable uses, under which it is well known that such uses would be upheld, although there was no specific grantee or trustee. In the case of the *Town of Pawlet v. Clarke*, 9 Cranch, 292, this court considered cases of an appropriation or dedication of property to public or religious uses, as an exception to the general rule requiring a particular grantee, and like the dedication of a highway to the public."

The court here attempt to base their decision, upon the recognition of the statute 43 Elizabeth in the bill of rights of Maryland; but I do not see how this can be, since there is not the slightest allusion in the bill of rights to that statute. But if this clause of the bill of rights can be regarded as a recognition of the statute of 43 Elizabeth, with much stronger reason may the same be said of our statute in relation to religious societies, which provides that such societies shall have power and authority "to contract, acquire, hold, enjoy, bargain, and sell, lease, mortgage, convey, and dispose of, any building or buildings erected for public worship, with the land necessary therefor; a burying-ground and parsonage for such society; and such other property as shall be applied to the support of public worship in such society, and to such means of education and charity as may be therewith connected." It will be seen that the case just cited, is in point to the case at bar. In each of these cases, the property is conveyed by grant; in both, the beneficiaries are a religious society, not in exist-

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ence at the time of the grant. What difference does exist, is manifestly in favor of the case at bar; for, in this case, trustees are interposed, capable of holding the legal title, and applying the proceeds of the property to the objects of the grant.

The case of *Ingliss v. Trustees of the Sailors' Snug Harbor*, 3 Peters, 99, was a writ of right by the heir at law of the devisor, against the trustees of the charity. The devise out of which the question rose, was this: The testator gave all the residue of his estate, comprehending a large real estate in the city of New York, to the chancellor of New York, the city recorder of New York, &c. (naming several other persons by their official description), in trust, out of the rents and profits, to erect upon the land upon which he resided, an asylum or marine hospital, to be called "The Sailors' Snug Harbor, for the purpose of maintaining and supporting aged, decrepid, and worn out sailors," &c. Within five years after the death of the testator, the legislature of New York, on the application of said trustees, incorporated them under the name of the Trustees of Sailors' Snug Harbor, and enabled them to execute the trusts declared in the will. The court sustained this bequest, and they labor to distinguish this case from that of *The Baptist Association v. Hart's Executors*; and Mr. Justice THOMPSON, delivering the opinion, says: "In the case of *The Baptist Association v. Hart's Executors*, 4 Wheat. 27, the court considered the bequest void, for uncertainty, as to the devisees, and the property vested in the next of kin, or was disposed of by some other provision of the will. If the testator had, in that case, bequeathed his property to the Baptist association, on its becoming thereafter, or within a reasonable time, incorporated, could there be a doubt but the subsequent incorporation would have conferred on the association, the capacity of taking and managing the fund?"

From this explanation of the case of *The Baptist Association v. Hart's Executors*, it is obvious, that the real difficulty in that case was, not the uncertainty of the ultimate beneficiaries, but the want of trustees capable of taking. Indeed,

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the analogy between that case and the present one, so far as the ultimate beneficiaries are concerned, is quite perfect. In the one case, it was "youths of the Baptist denomination, who should appear promising for the ministry;" in the other, "aged, decrepid, and worn out sailors." In both, the beneficiaries were uncertain, but capable of being made certain by the action of the trustees. It is clear that, in both cases, the objection was, the want of competent trustees. In the case of *The Baptist Association v. Hart's Executors*, if the association had been capable of taking the property as trustees, at the time of the deviser's death, or within a reasonable time thereafter, the devise would have been upheld. It is manifest, therefore, that the objection in that case has no application whatever, to the case at bar. I should, perhaps, have stated, that in the case just cited from 3 Peters, the court held, that the trustees named in the will, being described by their official capacity, were incapable of taking as trustees, until they became incorporated.

Such were the decisions in the Supreme Court of the United States, when the great case of *Vidal v. Girard's Executors*, 2 Howard, 128, arose in that court. The bill was filed by the heirs-at-law of Stephen Girard, to have the devise of the residue and remainder of the real estate, to the mayor, aldermen, and citizens of Philadelphia, in trust, as hereinafter mentioned, declared void, &c. The devise was to the mayor, &c., and their successors, in trust, that no part of the real estate should ever be sold or alienated, but the net proceeds appropriated to the erection of a college in the city of Philadelphia, sufficient to accommodate, at least, 800 scholars, and the requisite number of teachers, &c., and for the education therein, of as many "poor white male orphans, between the ages of six and ten years old," as the income of the residue of the property, real and personal, should be adequate to maintain; the preference among applicants, when the same should be greater in number than the vacancies, to be given, first, to orphans born in the city of Philadelphia; second, to those born in other parts of Penn-

sylvania; third, in the city of New York; and, lastly, in the city of New Orleans.

It can scarcely be necessary for me to remind this court, that the Supreme Court of the United States sustained the will of Mr. Girard, and that, under the light shed upon the subject of the jurisdiction of the Court of Chancery over charities, by some fifty cases, produced by Mr. Binney, from the then recent publications of the commissioners, on the public records in England, Mr. Justice STORY, in delivering the opinion of the court, disapproved of the dictum of Chief Justice MARSHALL, in *The Baptist Association v. Hart's Executors*. The court says: "Several objections have been taken to this bequest, &c. In the first place, that the corporation of the city is incapable, by law, of taking the donation for such trusts. This objection has already been sufficiently considered. In the next place, it is said, that the beneficiaries, &c., are too uncertain and indefinite, to allow the bequest to have any legal effect; and hence, the donation is void, and the property results to the heirs. And, in support of this argument, we are pressed by the argument, that charities of such an indefinite nature, are not good at common law, and hence, the charity fails, and with the decision of the court in *The Baptist Association v. Hart's Executors*, 4 Wheat. 1, as fully in point. There are two circumstances which materially distinguish that case, from the one now before the court. The first is, that the case arose under the law of Virginia, in which state the statute of 43 Elizabeth, chapter 4, had been expressly and entirely abolished by the legislature, so that no aid whatever could be derived from its provisions, to sustain the bequest. The second is, that the donees (the trustees) were an unincorporated association, which had no legal capacity to take and hold the donation in succession, for the purposes of the trust, and the beneficiaries were also uncertain and indefinite. Both circumstances, therefore, concurred; a donation to trustees incapable of taking, and beneficiaries uncertain and indefinite."

Judge STORY then proceeds with a careful analysis of the English cases, to show that the weight of authority in

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England, was in favor of the jurisdiction of the court, independent of the statute of 43 Elizabeth, and says: "But very strong additional light has been thrown upon this subject, by the recent publication of the commissioners on the public records in England, which contains a very curious and interesting collection of the chancery records, in the reign of Queen Elizabeth, and in the earlier reigns. Among these, are found many cases in which the Court of Chancery entertained jurisdiction over charities, long before the statute 43 Elizabeth, and some fifty of these cases, extracted from the printed calendars, have been laid before us. They establish in the most satisfactory and conclusive manner, that cases of charity, where there were trustees appointed, for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon, and enforced in, the Court of Chancery. In some of these cases, the charities were not only of an uncertain and indefinite nature, but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either no trustees appointed, or the trustees were incompetent to take. These records do, therefore, in a remarkable manner, confirm the opinions of Sir J. JEKYLL, Lord NORTHINGTON, Lord C. J. WILMOT, Lord REDESDALE, and Lord Chancellor SUGDEN. Whatever doubts, therefore, might properly be entertained on this subject, when the case of *The Trustees of the Baptist Association v. Hart's Executors*, 4 Wheat. 1, was before this court (1819), those doubts are entirely removed by the later, and more satisfactory, sources of information, to which we have alluded."

Now, in what is the case just cited, distinguishable from the case at bar? In that case, there were trustees capable of taking the property, and performing the trust;—so in this. In that case, the objects of the testator's bounty, were far more indefinite than in the case now before the court. "Poor orphan children"—who were they? How, and by whom, was the discrimination between those who were poor, and those who were not poor, to be made? Moreover, they who are poor to day; may be quite otherwise to-morrow, and

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they who are to-day wealthy, may be reduced to poverty before the close of another day; so that the beneficiaries of such a charity as Mr. Girard's, must be ever changing and fluctuating. Hence, it is clear, that there were no persons ascertained, at the time when the will took effect, in whom the beneficial interest could vest. At a hasty glance, the case of *Wheeler v. Smith and others*, 9 Howard, 55, might be supposed to be in conflict with that of *Vidal v. Girard's Executors*; but a careful examination will clearly show, that there is no conflict whatever between them. The case of *Wheeler v. Smith*, arose in Virginia; the devise was to "Hugh Smith and others, for such purposes as they should consider most beneficial to the town and trade of Alexandria." The court do not profess, even, to disapprove of any previous case; on the contrary, they expressly recognize the authority of the case of *Vidal v. Girard's Executors*, and base their decision upon the existing laws of Virginia, and the decisions in that state. The object of the bequest, was very uncertain and indefinite. Indeed, it was almost wholly discretionary with the trustees. The court say: "Under this devise, how can a court of chancery correct an abuse of the trust? By what means shall it ascertain a misapplication of the fund? There is nothing to restrain the discretion of the trustees, or to guide the judgment of the court. If the trust can be administered, it must be administered at the will of the trustees; substantially free from all obligation. But before we pronounce upon the character of this trust, it is important to ascertain by what law, it is to be governed. Is the common law of England, in relation to charities, as modified and enlarged by the statute of 43 Elizabeth, in force in Virginia?" Again: "From this, it appears, that what may be the common law of one state, is not necessarily the common law of any other. We must ascertain the common law of each state, by its general policy, and the usages sanctioned by its courts and statutes. And there is no subject of judicial action, which requires the exercise of this discrimination, more than the subject of charities. No branch of jurisprudence is more dependent than

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this, upon the forms and principles of the common law. In this view, we must look to the laws of Virginia as governing this bequest." Referring to the repealing act of 1792 (in Virginia), the court continue: "The statute of 43 Elizabeth, if it ever was in force in Virginia, was repealed by the above act. Some of the principles applicable to this case, were considered by the court in *The Baptist Association v. Hart's Executors*, 4 Wheaton, 1." After quoting a part of the opinion in that case, the court proceed: "And it was said" (in *The Baptist Association v. Hart's Executors*), "that the statute of 43 Elizabeth had been repealed in Virginia." "In the case of *Gallego's Executors v. Attorney-General*, 3 Leigh, 450, the court held: 'That the English statute of charitable uses, 43 Elizabeth, having been repealed in Virginia, the courts of chancery have no jurisdiction to decree charities, where the objects are indefinite and uncertain.'" Again: "The case of *Vidal v. Girard's Executors*, 2 How. 127, was decided under the law of Pennsylvania. The court say: 'It has been decided by the Supreme Court of Pennsylvania, that the conservative principles of the statute of Elizabeth, have been in force in Pennsylvania, by usage,' &c. 'The *cestuis que trust*, are the town and trade of Alexandria. It would be difficult, to express in more indefinite language, the beneficiaries of a trust. How can a court of chancery administer this trust? On what ground can they remove the trustees, for an abuse of it? The discretion of the trustees may be exercised without limitation, excepting that the fund must be applied for the benefit of the town and trade of Alexandria. And if the application of the fund be, however remotely, connected, with the objects of the trust, the judgment of the court could not be substituted for the discretion of the trustees. It is doubtful, whether so vague a bequest, could be sustained under the 43d of Elizabeth. Without the application of the doctrines of *cy pres*, it could not be carried into effect. In Virginia, charitable bequests stand upon the same footing as other trusts, and consequently, require the same certainty, as to the objects of the trust, and the mode of its administration."

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The great case arising under McDonough's will, came before the Supreme Court of the United States, at its December term, 1853. The bill was filed by the heirs at law, to set aside so much of the will as gave the property of the testator to the corporations of New Orleans and Baltimore, for the free education of the poor of New Orleans and Baltimore. Now, the object of the bequest here, is sufficiently certain, as it is in the case at bar, namely, the education of the poor of said cities, in one case, and the support of a Congregational church, in the other; but the beneficiaries in the McDonough will case are quite indefinite. How could this bequest be upheld, except upon the principles we maintain? This case certainly raises the strongest possible presumption, that the court regarded the question of the validity of a donation to charitable uses, where trustees capable of taking are interposed, and the object of the grant definite and certain, as a settled point in that court. *McDonough's Executors v. McDonough's Heirs*, 15 How. 367.

In *Gallego's Executors v. The Attorney-General*, 3 Leigh, 455, CARR, J., says: "The course of decisions in England, was admitted on the other side, but it was contended, that they rested entirely on the statute of 43 Elizabeth, and did not at all belong to the ordinary powers of a court of equity. This was the only serious question. I certainly shall not discuss it; for I find this completely done to my hand by Ch. Justice MARSHALL, in the case of *The Baptist Association v. Hart's Executors*. The cases cited and examined, and the reasons given by him, prove conclusively to my mind, that in England charitable bequests, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, cannot be established by a court of equity, either exercising its ordinary jurisdiction, or enforcing the prerogative of the king, as *parens patriæ*, independent of the statute 43 Elizabeth; and as that statute, if ever in force here, was repealed in 1792, I conclude that charitable bequests stand on the same footing with us as all others, and will alike be sustained or re-

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jected by a court of equity. I think the bill of the attorney-general must be dismissed."

The case of *Dashiell v. Attorney-General*, 5 Harrison & Johnson, 392, was a bill by the attorney-general, on the relation of numerous parties entitled under the will, to enforce the execution of the trusts. BUCHANAN, J., says: "The peculiar law of charities originated in the statute 43 Elizabeth, for regulating charitable uses; and independent of that statute, a court of equity cannot, in the exercise of its ordinary jurisdiction, sustain and enforce a bequest to charitable uses, which, if not a charity, would, on general principles, be void; and in this we are supported by the Supreme Court of the United States, in the case in 4 Wheat. 1, in which all the principal cases are reviewed, and the subject very fully investigated." This is all that is said by the court on this head.

Upon the foregoing cases in Virginia and Maryland, it is only necessary to observe, that they were decided upon the authority of *The Baptist Association v. Hart's Executors*, and under the influence of the erroneous notions which then prevailed, in relation to the jurisdiction of courts of chancery, prior to the statute of 43 Elizabeth.

I see nothing to distinguish the case at bar, from that large class of cases in which grounds are dedicated to the use of the public, for churches, public buildings, streets, highways, &c. The proprietor of a town marks upon his plot, certain lots and squares for churches and public buildings, streets, and public landings. There is no grantee in existence at the time, in whom any interest whatever, legal or equitable, can vest. Was it ever supposed that in such a case, the grant must fail, by reason of the want of a grantee? But it may be asked, suppose the grantees never come into existence, what becomes of the property? I answer, that it reverts to the grantor. Indeed, I have no doubt that the grantor, after the lapse of a reasonable time, might resume his ownership, perhaps without the aid of a court of equity, certainly with it. The case of *White's Lessee v. The City of Cincinnati*, 6 Peters, 431, strongly illus-

trates this point. In that case, the proprietors at the time of laying off the city, left a gore of land adjoining the river, which was called a common, and so marked on the original plot of the town.

The true principle is clearly laid down by LANE, C. J., in *Brown v. Manning*, 6 Ohio, 303, where he says: "The subject of appropriations to public uses, has been frequently under the consideration of our courts, and it is now settled, that where lands are dedicated by the owner to any lawful use, public, pious, or charitable, and are used for the object, and in the manner contemplated by the owner, it enures as a grant. The existence of a grantee is not essential to the validity of such dedication; nor is any form of words necessary to give it effect. If accepted, and used by the public in the manner intended, it works an estoppel in *pais*, precluding the donor, and all claiming in his right, from asserting any ownership, inconsistent with such use." The case of *Clerq v. Gallipolis*, 7 Ohio, 219, and *Thornhill v. McCandlis*, 7 Ohio, 135, are upon the same principle.

Now it would be quite absurd, for the proprietor of a town or city, to dedicate certain grounds to public uses, and to resume the grant immediately, by reason of the non-existence of the institutions intended to be created or endowed by the grant itself! But if, in such a case, the grounds were not within a reasonable time, appropriated to the uses intended, it would be quite reasonable that they should be restored to the grantor. What would be a reasonable time, must depend altogether upon circumstances.

What are the circumstances of this case? Why was not a church organized at an earlier day? Let the testimony of D. W. Kilbourne and others, answer these questions. The conveyance was executed by John McKean, in 1846. The property was then worth about \$400. It was, at that time, and, indeed, until after the death of Mr. McKean, wholly insufficient to build and support a church. The members of the denomination in Keokuk, to whose use and benefit the property was dedicated, were few in number, and they did not feel able to sustain a church until the fund,

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arising from Mr. McKean's bounty, became available. It would have been highly imprudent for them to have done so. Hence, they wisely postponed the organization of a church, until the fund became available; never, however, for a moment, abandoning the intention of doing so, and of appropriating the land. In the meantime, Mr. McKean died, having recognized in his will the previous grant. The pious and benevolent man was scarcely in his grave, before this assault was commenced upon the title by which the trustees held this property. It is clearly established by the testimony, that a church would long since have been organized, and the property applied to its legitimate object, but for this very litigation, which has to this day, rendered the fund unavailable. The benevolent and disinterested gentlemen who stand opposed to us in this case, purchase for a valuable consideration the interest of Mr. McKean's very enlightened heirs, and obtain from them quit-claim deeds, just about the time that the property becomes valuable. They cast a cloud upon the title; they prevent any revenue from accruing from the property; they thus defeat the organization of a church; and now they modestly ask this court to defeat the bountiful purpose of the donor altogether, because the church was not organized at an earlier day. How keen and piercing is the logic of the land speculator! How astute he is, in finding out the flaws of the law! How admirable his sense of justice, to the sacred memory of the benevolent dead, and the rights of the living!

Let me restate his case. Some foolish old man, affected with the absurd idea of doing good to his fellow men, gives a part of the earning of a toilsome life, to some great and worthy public charity. He conveys property to trustees, if you will, for the purpose of building and maintaining a hospital for the insane. While the trustees are waiting for the accumulation of the fund, to such an amount as to justify the building of a house, and the organization of the asylum, the benevolent donor dies, and the astute land speculator, taking advantage of the weakness or cupidity of his heirs at law, obtains a deed for their interest, and involves

the whole charity in litigation. Thus, the fund is rendered wholly unavailable, and the organization of the institution is prevented. Having done this great wrong, not only to the deceased grantor, whose right it was to appropriate his property to this benevolent purpose, but to the houseless, homeless, afflicted, class of persons intended to be benefited; he comes into a court of equity, with a prayer that the court will aid him in taking advantage of, and consummating, his own wrong, by overturning the charity altogether, on the ground that no institution was actually organized at the time of the commencement of his suit, and all this for the wise and most equitable purpose of putting money in the purse of the speculator, arising from the toil and care of another man.

Indeed, the principle that there must be a grantee *in esse*, never did apply to the beneficiaries of an estate in trust. It was a principle of the common law, founded upon feudal reasons, and applicable only to the legal title. Lands being held under the feudal system, by the tenure of military and other services, it was necessary, that there should be a grantee in existence, capable of performing the feudal services. The policy of that law was, therefore, hostile to estates in abeyance. Moreover, an insuperable obstacle to the creation of estates *in futuro*, grew out of the feudal mode of conveyance. Lands could only be conveyed by open and public investiture, in the presence of the retainers of the lord of the fee (who were the witnesses of the fact), by livery of seizin, with appropriate signs and symbols. This resulted from the ignorance of the feudal proprietors, most of whom were so unlettered, as to be quite incapable of conveying land by charter or writing. Hence, too, the objection to estates in abeyance, and to the creation of titles *in futuro*, did not apply to wills and testaments, which grew up under the statute of wills, after the feudal law became much relaxed in England. By way of executory devise, an estate could be created, to take effect, subsequent to the death of the testator, because no livery of seizin was necessary, and no feudal services required by the grantee. The introduction of trusts, also avoided these technicalities of the common law under the feudal system.

It is urged that the deed, in this case, is void, because at the time of the grant, there was no church of the denomination specified in existence, either corporate or otherwise. The very terms of the deed, looked to the future organization of a church. The object of the charity, was clear and certain. It was evidently, the religious instruction and edification of *persons* attached to the denomination to which the grantor belonged, by the preaching of the gospel to them, and ultimately, by that means, the general improvement in religion and morals, of the place where the church was to be established. To effect this object, a church was thereafter to be organized. There were persons in existence, residing in the town of Keokuk, of the religious denomination specified. This we have proved. Indeed, the very trustees in the deed, were persons of that denomination. In the nature of all such cases, the persons to be immediately or remotely benefited, must be uncertain and fluctuating. The class exists, but the individuals are indefinite.

Now, this case is precisely analogous to that large class of cases to be found in the books, in which property has been given for the endowment of schools, for the education of poor and orphan children, and the establishment of asylums and hospitals, for the indigent and the unfortunate. Thus, in *Griffin v. Graham*, 1 Hawkins, 97, the bequest was to trustees, for the establishment and support of a school thereafter to be erected in the town of New Burn, for the education of indigent scholars:—so, in *Vidal v. Girard's Executors*, the fund was for the support of a college thereafter to be organized, for the education of "orphan children." So, in *The Zanesville Canal and Manufacturing Company v. McIntyre's Executors*, the devise was for a school to be organized at some future time, for the education of the poor children of the town of Zanesville. And in *Ingliss v. The Trustees of the Sailors' Snug Harbor*, the devise looked to the future erection and organization, of an asylum for "disabled seamen." To the same effect substantially, is *Moore's Heirs v. Moore's Devisees*, 4 Dana, 354; and the case in 8 Dana, 88. In *Wade v. The American Colonization Society*, 8 Smedes

& Marsh. 610, the bequest was to the American Colonization Society, in trust, for the establishment of "one single seminary or institution of learning in Liberia." So, in *Brown v. Hummel*, 6 Barr, 86, where the devise was to trustees, to establish a perpetual charity, for the education of poor orphans, and the erection of an asylum house, to be called "Emaus." So, in *Witman v. Lex*, 17 Sergt. & R. 88. So, 9 Barr, 423. A great many other cases of the same class, in England as well as the United States, might be referred to, but it is deemed unnecessary to our purpose.

Can this court doubt, for a moment, that the cases cited above, were correctly decided? Could this tribunal have decided them otherwise? I think not; and it seems to me quite impossible to distinguish them, in principle, from the case at bar. In the cases cited, the objects of the bounty were sufficiently certain,—“the education of the poor,” &c., but the organization through which those objects were to be attained, were not in existence, and were thereafter to be created; children could not be educated, without the erection of school-houses, the employment of teachers, and the organization of schools. All this was in the contemplation of those who made the donations. The persons who were to be immediately benefited by these charities, may be supposed to have existed; for it is reasonable to presume, that there were, at all times, poor children in Philadelphia, and disabled seamen in New York; but these beneficiaries were evidently not designated, at the time, that the property passed out of the donor or grantor; and moreover, they were constantly liable to change and fluctuate, to increase or diminish, in number. There were evidently no beneficiaries in which any interest could possibly vest. I submit that in the case at bar, the beneficiaries are less uncertain and indefinite, and the objects of the charity quite as certain.

No man doubts, I presume, that property may, in Iowa, be given, by will or deed, to trustees, in aid of institutions of learning and benevolence, in actual existence at the time of the grant or devise; for the support of schools and colleges; hospitals for the insane; and asylums for the blind,

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the deaf, and the dumb. To deny this right, would be to suppress the best impulses of the human heart; to stay the outstretched hand of "heavenly" charity, and to ignore the noblest, the most humane, and the most useful, institutions of the land. Now, if it be competent for a man to give his property for the support of such institutions in actual existence, why not for the support of those which are hereafter to be created, and in contemplation of their establishment? Nay, why may he not provide for bringing such institutions into existence, and the support of them when they are created. What difference is there in *principle*, in the two cases?

But there are many cases precisely in point, upon this question. Thus, in 2 Story's Equity (§ 1190, note 2), it is said: "If the object of the gift be certain, but *not at present in existence*; yet if its existence may be expected hereafter, the court will neither consider the gift lapsed, nor apply it to a different use"—citing *Aylet v. Dodd*, 2 Atk. 238; *Atty. Gen. v. Lady Downing*, Ambl. 571; *Atty. Gen. v. Oglander*, 3 Bro. Ch. 166. So, in 2 Kent's Com. (6th ed.) 288, note a, we find it stated, that "In the case of *Milne v. Milne*, 17 Louis. Ch., under the will of Alexander Milne, in which legacies were left to two public charitable asylums, to be after the death of the testator, incorporated, and established at Milneburgh, it was held, that the courts were bound to aid in carrying out the intentions of the will." See *Proprietors of Town of Shapleigh v. Pillsbury*, 1 Greenlf. 271; *The Town of Pawlet v. Clarke and others*, 9 Cranch, 330; *Kurts v. Trustees of the Lutheran Church*, 2 Peters, 566; *Ingless v. Trustees Sailors' Snug Harbor*, 3 Pet. 99; *Andrew v. New York Bible Society*, 4 Sandf. 178, stated in Willard on Eq. Jurisprudence, 593, where it is shown to have been reversed; *Winslow v. Cummings*, 3 Cushing, 358.

J. C. Hall, for the other appellants, argued as follows: In this case, I admit:

1. That the trustees named in the deed, could take the property granted if there had been certain beneficiaries in existence.
2. That the deed is sufficient, so far as the words

of grant are concerned, to vest in the trustees a fee simple title. To these admissions, I add these points, as true rules in relation to devises and grants, made for charitable uses and purposes:

1. That a devise or grant to a corporation capable of holding, or a person or persons by name, for a definite and specific use, is good at law; and the powers of a court of chancery are confined to the mere execution of the trust, to secure the faithful application of the fund or property, to the use and object indicated in the deed or will; in other words, to carry out the intention of the donor.

2. That where there is a devise or grant to, and for a specific charitable use or object, and the grant or devise does not appoint trustees, or the trustees refuse or fail to act, the court will interpose and supply trustees, and carry out the intention of the donor, and secure to the objects of the grant or devise, the benefits intended.

3. Where there is a devise or grant for the benefit of a recognized charity, such as for the education of children—providing for the aged and infirm—the insane, blind, or poor, the charity will not fail, for the want of a trustee to distribute it, but the court will provide, through trustees, for the disposition of the fund.

4. That the jurisdiction of the Court of Chancery is not to create a fund. Their powers, under the modified doctrine of *cy pres*, as it exists in this country, is merely to direct the execution of the donor's intention, and prevent the object from being deprived of the benefit intended. The court, in all of its doings, represent the persons, institutions, and classes, who are to be benefited. It is for the beneficiaries alone, that the court interposes, and when invoked by the trustees, it is only that they require the interposition of the court, to effect the purpose, and secure to the beneficiaries, the charity of which they should be the just recipients.

5. That to make a devise or grant, the object upon which the funds are to be expended or given, must be certain; it must be such an institution, cause, or class, that the court can see and know, that the intention of the donor can be

carried out, and will be carried out. When it is not thus certain, it will be void.

6. Property may be given to create a charity. In those cases, the donor seeks only to change the nature and character of the property given, into another shape or form, and present it to the beneficiaries in this altered and modified form. Thus, in the building of school-houses, colleges, hospitals, &c., the donor directs that his money or land, be put into a building, and given in that shape. To a bible society, &c., to be laid out in the purchase of bibles, and so given. The beneficiaries cannot claim the money or land, but they can claim the building, and the bibles, and a court of chancery will compel the trustees to put it in those forms designated by the donor.

7. To constitute a charitable use, there must be a donor, a trustee, and a beneficiary. In case of a grant or demise, with or without trustees, where there is no party or parties designated who can take the property, or where they are so uncertain, that the court cannot direct intelligibly the execution of the trust, the property remains undisposed of, and falls to the heir or next of kin. A court of chancery, always acting for the beneficiaries, stops the instant it ascertains that there are none, or that they are so uncertain that it will have to act in the dark, when it sets about the application of the trust. 9 Howard, 189.

In the case at bar, it is conceded, that at the date of the deed from McKean to Chittenden and others, and at the death of McKean, and at the commencement of this suit, there was no Congregational church in Keokuk; there were no Christians united under one form of ecclesiastical government, using the creed, ritual, and ceremonies of the orthodox Congregational sect of Christians; there was no body, association, union, or collection of persons, so united, acting and associating, that could come under the description in the deed, and the very terms of the deed proves this state of the parties. It follows, that there was a grant to trustees, in trust, but no beneficiary—no object—upon which the property could be expended, or the use conferred. If this

court had then been called upon to execute the trust, it would have abandoned the task, and, in the language of Judge McLEAN, in 9 Howard, 159, would have said, "the property has never been disposed of" by McKean; in the place of finding it uncertain, they would have found it certain, upon a mere glance at the deed. If the deed did not dispose of the property, it certainly has never been disposed of. If there were no beneficiaries to take, there could be no disposition of the property, and the title remained in McKean, and at his death, went to his heirs and legal representatives.

The trustees could not produce or create the church contemplated. If it had been a building, they could have erected one, and if they had neglected to do so, this court would have compelled them to do it, or taken the trust property from them, and conferred the power and duty upon others. But this court could not form the church; they could not gather persons together, and require them to worship under the directed creed; and no person could claim an interest in the charity, except in such an organization. 1 Amer. Ch. Dig. 161.

The American doctrine in relation to charities, does not adopt the English doctrine of *cy pres*, only in a modified and very restricted form. It stops where prerogative, under the English, begins. It is strictly judicial. It never interposes to hold up, to sustain. It never takes hold of the property, only to apply it where the object is clear, and where the property has been disposed of in the very act that constitutes the charity. Our courts have never permitted the doctrine to go so far, as to act in the capacity of *parens patriæ*. They have never taken jurisdiction, merely because the donor intended to dispose of a charity, and exercised that jurisdiction, merely *in rem*; and, perhaps, the real distinction between the English and American doctrine, can be stated in that way. The American courts limit their jurisdiction to matters purely *in personam*. Where the persons or parties are uncertain, vague, or not in existence, or incapable of holding or taking, they say that the property

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has never been disposed of, and remains in the donor or heirs. Thus, they require parties, or objects, to be pointed out, with reasonable clearness, and to be in existence, or capable of being brought into existence by the trustees; and they exercise jurisdiction, merely in aid of existing parties and objects, or in creating the subject matter of the charity through the trustees. Their action is *in personam*.

The English doctrine of *cy pres*, stops where they have found property dedicated to some charitable use; it operates upon the property, and can hold on to it, and retain it; seek the object described, or an approximate object; and if they find that the object intended, is not in existence, or cannot hold, they still retain the property, and dispose of it for some charitable purpose. They operate upon the *rem*. The American courts confine their doctrine to the execution of a grant or gift, that was complete and perfect, and capable of execution at the moment of its creation. They hold the *rem* only, to execute the intention, where that intention is complete and capable of execution by the very terms of the grant. If, when the donor executed the deed, he did not dispose of the property, it has never been disposed of; it remains to the grantor and his heirs. There is no rule of law by which the property can be divested, only by the deed. If there has been no other act, and that act did not dispose of it, surely it remains; it results that there cannot be a title in the donor, which this deed would pass at a future day; nor can it be that the deed owes its validity to a fact or circumstance, that was not in existence when it was executed. This would make the deed, an incident, not the capital circumstance. The deed would not create the estate. At first blush, it may be difficult to see why a grant for the use of a church; to an association of Christians, not in existence; to an artificial association, where there was none to receive, but there might be one, should be void. It, also, may be difficult to see, why a grant, made clearly for charitable purposes and uses, and where the particular object is indefinite, or incapable of holding, should not be held and appropriated to a kindred charity. Yet the solution is the same, to both of

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these propositions. It is because it requires, in both cases, the exercise of a power not judicial; it requires the exercise of a power, which pertains to proprietorship and ownership. For we have seen, by all the authorities, that such a grant would be void at law; and it is plain, that unless a court of equity interposes and supplies acts which the party has omitted; supplies beneficiaries, where the grantor could not find any; creates, before it finds; exercises a prerogative power, before a judicial one, that such donation must fall.

There is not an American decision, of any respectability, that goes any farther than the positions above presented. A careful examination of the cases cited, will disclose, that the courts have always required that the beneficiary should be in existence, in some form, at the time the trust is created. The beneficiaries may be numerous, and general as the entire public—a class—the poor, aged, ignorant, yet whatever the object may be, it must be in existence. 19 Alabama, 821; 7 Johns. Ch. 292; 9 Cow. 439; 4 Wend. 494; 24 Pick. 146; 9 Metcalf, 121; 3 Cushing, 353; 1 Hawk. (N. C.) 97; 2 Strobhart, 379; 4 Georgia, 404; 8 Blackf. 15; 4 Dana, 88; 8 Dana, 75; 7 B. Monroe, 73; 17 Serg. & Rawle, 88; 10 Barr, 336; 1 Swan, 19; 2 Peters, 576; 3 Peters, 99; 9 Howard, 189; *Vidal v. Girard's Executors*, 2 How. 128; 2 Story Eq. Juris. §§ 1154 to 1190; Willard's Equity, §§ 576 to 594. These and numerous other cases, have been cited and relied upon. The doctrine is summed up and shown in Willard's Equity, 580, from which it appears, that the courts of this country have confined their jurisdiction to cases strictly judicial. When it is known that this very question, and in this very case, has been before this court, and there decided, after full argument, it would seem that the parties might consider the question at rest.

Samuel F. Miller, pro se. [The reporter found upon the files, no argument or brief of Mr. Miller.]

WRIGHT, C. J.—It is first objected, that the deed from McKean to the trustees, did not impart notice of its contents,

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because the certificate of acknowledgment was not in due form of law. If this was true, it could not, under the testimony, aid those who purchased from the heirs. The possession of this land by the trustees, and those claiming under them, as well as the known existence of this deed, as shown by the evidence, gave *actual* notice of an outstanding adverse title, and the sufficiency of this acknowledgment is, therefore, an immaterial question. If they had actual notice of this deed, they are affected by it, though there was no certificate of acknowledgment indorsed thereon. *Blain v. Stewart, post.* It is next urged, that this being an action for partition, the equitable rights of the parties to this land, cannot now be adjudicated, but the case must be determined alone upon the legal title; or, in other words, that in such actions, the court will alone determine who has the legal title, and that if any person claims an equity, which he insists should draw to it the legal right, he must first, in an independent action, establish that equity, and that then a court of law will take cognizance of his claim. On this point, however, we have no difficulty. The plaintiff in his petition, expressly makes these trustees parties; sets forth what he says is their pretended claim to this land; and avers that while it is invalid, it is a cloud upon his title, and asks that it may be removed. The trustees in their answer, set up their title, and call upon the plaintiff, as well as the other defendants, to answer to their claim, as to a cross bill. This they afterwards do, not objecting in any way to the form of the answer made by the trustees, or to their right to have this title thus adjudicated; and then, as if to remove all possibility of difficulty, the parties, by an agreement in writing, expressly agree that the case shall "be treated to all intents and purposes as a proceeding in chancery." Without inquiring whether there is technically a cross bill on file—whether the title under which the trustees claim is equitable, and not legal—whether this court will, in an action to partition lands, act alone upon the legal estate—it is sufficient to say, that this objection comes too late. By all their acts and agreements, those that now object, have recog-

nized the right of those claiming under the McKean deed, to have their title adjudicated in this case, whatever its character, and we shall therefore so determine it.

It is next objected, that the property conveyed is more in amount and value, than could be held by any religious society under the statute in force when the deed was made. In support of this position, we are referred to chapter 128, laws of 1843, 538. This, as well as the succeeding chapter, were repealed, however, by the act of February 7th, 1844 (Laws of 1844, 4), and by the latter act must this question be judged. It provides: "That any religious society in this territory, by complying with the provisions of this act, may have perpetual succession by such name as shall be designated by such society, and by such name shall be legally capable of prosecuting and defending suits in any courts of law and equity in this territory; and shall have power and authority to contract, receive, acquire, hold, enjoy, bargain, and sell, lease, mortgage, convey, and dispose of any building or buildings, erected for public worship, with the land necessary therefor, a burying-ground and parsonage for such society, and such other property as shall be applied to the support of public worship in said society, and to such means of education and charity as may be therewith connected." This section, most clearly, does not limit the *quantity* or *value* of the property to be held, but alone restricts the purposes for which it is to be acquired and applied. It recognizes the objects or purposes therein specified, as worthy and well deserving legislative protection and sanction, and for these purposes, the power is given to these societies to acquire and hold property, which may be either real or personal. By this deed, this land and its proceeds, were to be held for the use and benefit of "the first Congregational Church," without designating the particular purpose or purposes to which it was to be applied. It might, therefore, be held for and devoted to all or any of the objects designated by the statute. It, of course, could not be devoted to any other purpose.

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If the church or trustees, should misapply the trust property, a different question would arise. As it stands, however, we see nothing to sustain this objection. As to the power of ecclesiastical bodies, and other corporations, to hold lands for charitable or other purposes, see Story's Eq. Jur. § 1187; 2 Black. Comm. 268 to 274; 4 Wheat. Appendix, note 1; *Griffin v. Graham et al.*, 1 Hawk. 97. And that the objection to the grant, because of its creating a perpetuity, or tending to lock up the land, does not apply, the trustees having the power to alienate and invest the proceeds, see last case above cited. Also, *Moore's Heirs v. Moore's Devises*, 4 Dana, 354; *Hillyard v. Miller*, 10 Barr, 326; *State v. Girard*, 2 Iredell Ch. 210.

The only remaining question relates to the validity of the deed, dependent upon the existence of a beneficiary, capable of enjoying and holding the property conveyed. This question has been argued with zeal and ability. Counsel have manifested a commendable, and even unusual care in its preparation—a care fully commensurate with the importance of the case, and the intricate questions involved. And while many topics, bearing on the principal question, have been discussed in the argument, we shall confine ourselves alone, to such, as in our judgment, are proper for the final adjudication of this controversy. And in doing this, it is proper that we first ascertain and settle from this deed, its character, object, and purpose. The evident intention of the donor was, to create a fund for the use and benefit of a church, which he desired to have organized and built up in the city of Keokuk. The management of this fund he intrusted to five trustees by name, who at that time accepted the trust, and undertook to execute the same. The very words of the grant show, that there was no such church at that time organized in Keokuk, as could then take the land, and this is abundantly shown, by the testimony, and not denied by the counsel for the trustees. Neither by the terms of the grant, had the trustees any power to bring the beneficiary or church into existence; nor is there any method therein designated, by which it may be created. The power

of the trustees only extended to the holding, leasing, and selling of the land, and the investment of the money arising from such sales and leases, for the use and benefit of such contemplated church organization, and the appropriation thereof to such purposes, when the church should be so organized.

From the testimony, outside of the deed itself, it appears that the trustees named, as also other persons in the city of Keokuk, were members of this particular denomination, but had no organized existence. In February, 1854, these persons, with others, first organized, or became incorporated, as a church of the character and name designated in the deed, which organization appears to have been contemplated for a number of years previous, and at no time to have been abandoned. Under these circumstances, the question presented for our determination, is this: Can a grant to trustees, for the use and benefit of a church to be afterwards organized—with no power in them to create the beneficiary, or to appropriate the land or funds arising therefrom, for any purpose, until such organization—be upheld, so as to pass the title, if such church shall afterwards (say in seven years, as in this case) be so created or brought into existence, as to acquire and hold property, or be the recipient of a charity? This statement of the question, we think, is quite as strong, in view of the claims of the church, as can well be justified from all the facts. It is, however, as near in form and substance, that made by the counsel opposed to the church title, as we have been able to state it; and for that reason, we shall so treat it, preferring as we always do, as far as possible to decide the very question presented. As already stated, this question has been most fully, and we may add, very fairly argued. Counsel have in their written and oral arguments, brought to our attention, all of the leading authorities in this country, and many of those in England, on the subject of grants and devises to charitable purposes. We have endeavored to give to the question, that attention its importance and intricacy demands, and the more so from the fact, that it is claimed that this same question has been deter-

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mined by the former judges of the court, as to this same title, which decision we are asked to overrule. And while we have concluded to sustain the title of the church to this property, yet it is with a hesitation, we would not have felt, but for the decision referred to, and the very great confidence manifested by counsel opposed to its validity. We may add, however, that we have less hesitation in so holding, from the fact that counsel who claim the benefit of the former decision as authority, admit that it does not consider the real question involved as fully, if as attentively, as its character demands. In considering this decision, we first remark upon the stage of the case upon which it was made, and the ability of the church to take this property, then and now. That was a bill in chancery, filed by Marshall, one of the present defendants, against the trustees, setting forth this deed—averring that they held the land as a mere naked trust; that at the time of the execution of the deed, there was “no Congregational church in Keokuk, nor any association or corporation known by such designation, nor has there been since such conveyance, nor is there at this time, any such church, or any body or association, claiming to be such church;” that he had purchased the interest of certain of the heirs of McKean; that said conveyance by McKean to the trustees, was without any consideration; and that as there was no church or association in existence, upon which the estate could be cast, the said trustees held the same in trust for him. To this bill, there was a general demurrer, which was sustained in the District Court, but overruled in this court—and the case remanded, where it is now pending. A leading element in that case, as distinguished from this, is that by the demurrer, it was admitted that up to the time of filing the bill, there was no society or organization capable of taking the property. Nor was there anything to show that the trustees had taken possession of the land, or that the grantor had recognized, if not confirmed, the conveyance by his will. Now, the church has been organized; it is shown that the trustees did take possession of and rent the land; and that the grantor did recognize the existence and validity of the deed by his

last will and testament. The absence of all these things, evidently had much influence in the determination of the former case. For it is said, that "had the contingency happened; had the church been organized under the restrictions of the deed, and taken to itself the use and possession of the land during the lifetime of McKean, much weight should be given to the arguments of counsel for appellees. In such a case, although the deed in itself would be legally void, as having had no grantee, and void as creating an estate *in futuro*, still the doctrine of *cy pres* might be applied, for the purpose of carrying out the intention of the grantor, under circumstances which gave notice to the heirs, or subsequent purchasers, that such intention was manifest, not only before, but after, the contingency happened. But in this case at bar, the contingency did not happen; there was no subsequent circumstance, showing a continued intention on the part of the grantor, that his heirs should be divested of their rights, upon any contingency subsequent to his death." And while we would not say, that the absence of these circumstances, controlled the determination in that case, yet we feel justified in concluding that it had much influence, as is evident from the above, as well as other parts of the opinion. Now, we think, and hope to be able to show, that these circumstances have a material bearing upon the question involved; as also, that this grant can, and must be upheld, without any reference to the doctrine of *cy pres*. If the first part of this proposition is true, then the conclusion arrived at in this case, does not necessarily overrule the other.

But before coming to this view of the case, let us examine some other positions taken in that opinion, and upon which it appears to have been mainly based. "It is obvious (says GREEN, J., in delivering that opinion), that the trustees were not vested with a freehold estate. The grantor intended to convey a legal title to them, upon certain contingencies. As trustees, the deed vested in them a contingent, naked legal title. But the use, under our statute, could only take effect upon the contingency that the *cestui que use* should be

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organized or incorporated into existence." And again: "It seems obvious that no estate was created by virtue of the deed, but a kind of remainder *in futuro*, to pass upon the remote possible contingency, that the trustees should continue a valid existence, and the *cestui que use* should be created, be properly christened and located, and endued with an orthodox spirit;" and again, "this cannot be regarded even as a valid remainder, for it is not supported by any vested estate of freehold. An estate vesting upon a remote contingency, is void;" and finally: "We conclude, then, that the conveyance cannot be sustained, even as a charitable use, because the intention of the grantor cannot be carried out consistently with the deed itself, nor with the established principles of common law. Nor can it be good as a contingent use, or a contingent remainder." Now, with all due respect, we must be allowed to say, that we are unable to see what much of the matter contained in the above quotations, has to do with this case, or the question substantially involved. It is not denied by counsel, that this deed is sufficient, so far as the mere words of the grant are concerned, to vest in the trustees a fee simple title, nor indeed could it well be. It is also admitted, and properly so, that the trustees could and did take the property, if there had been certain beneficiaries in existence capable of taking the use. How, then, can it be said that "a kind of remainder was *in futuro*, to pass upon the remote possible contingency &c." or why the dictum, that the grant could not "be regarded even as a valid remainder, for it is not supported by any vested estate of freehold?" What has the doctrine of contingent remainders, to do with this question? We must confess that we are unable to see any, the remotest connection. Here the legal estate was a unity—there was no division—no particular estate for life or years, to one, and an estate to be enjoyed in fee simple after its termination, by some other. What particular estate preceded the remainder in this case? Or what remainder was there? Take the common case of a grant to A. for life, and then to the brothers and sisters of A. This latter estate is called the estate in remainder:

Was there any grant to the trustees in this case, and then to the church? Did the trustees have a particular estate carved out, with the remainder to the church? So, also, if the trustees, by the words of the grant, took an estate in fee simple, as is admitted, how would any person claim or pretend that anything could remain? If all was granted, how could there be anything left? Sir Wm. Blackstone, in speaking of this estate, says that both of these interests (the particular estate, and estate in remainder), are but one estate. The present term for years, and the remainder after, when added together, being equal to one estate in fee. They are different parts, constituting one whole, being carved out of one, and the same inheritance. They are both created, and may both subsist, at the same time, the one in possession, and the other in expectancy. 2 Bl. Com. 164. But without pursuing this inquiry further, we think we are fully justified in saying, that the church does not claim this property as the remainderman claims his estate; nor are the learning or doctrines applicable to that branch of the law, in any way connected with this case. And without other comment on specific portions of the opinion, we must say, that it appears to have strangely misconceived, or not to have carefully considered, the prominent and material questions involved in the case. We understand that McKean not only intended to, but did, convey a legal title to these trustees. By the terms of the grant, however, they held the legal title in trust for the church. And the real and only question in the case is, whether under the circumstances developed, there was such a want of beneficiaries, as that upon the death of McKean, these trustees held this estate for his heirs. And so far as the opinion in the case of *Marshall v. Chittenden et al.* (above quoted from), can be considered as maintaining the affirmative of this proposition, we feel constrained to overrule it. In doing so, we are not unmindful of our duty to adhere to former decisions, and especially those made by this court, and more particularly such as may be regarded as settling and establishing rules for the alienation and acquiring of property. Strong reasons, in-

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deed, should be presented, before we should depart from decisions carefully considered and deliberately made. Certainty in the law is fully as much to be desired, as mere abstract perfection. In this instance, the questions involved arise for the first time in this state. The former judges of this court made a decision, and remanded the case to the court below. That case is still pending. It is not one of those cases where, for a series of years, a particular rule of property has been settled in the state, and which should not be disturbed, except for the most cogent and controlling reasons. The question is a novel one in this state. It is of the utmost importance that, at this early stage of our judicial history, we should determine it properly, if possible; and not permit a rule, hastily settled, to grow up and receive the sanction of our courts—a rule, we think, that does violence to that principle, which induces courts of chancery to give all proper encouragement and favor to charitable grants and bequests.

We come, then, to consider the question as though it was undecided in this state. And if this was a grant to an individual, we do not think it could be sustained. By the common law, all grants between individuals must be made to a grantee in existence, or capable of taking, otherwise there could be no such thing as livery of seizin. This rule does not apply, however, to grants or devises to charitable or benevolent purposes, and especially when the legal estate is vested in trustees, to hold for the use of the contemplated charity. In such cases, if the intent of the donor can be ascertained, and it be legal, courts of equity will carry it out. *Kniskern v. Lutheran Church of St. John and St. Peters*, 1 Sandf. Ch. 439; *Outows v. Eslava*, 9 Porter, 527; *Winslow v. Cummings*, 3 Cush. 358; *Dickson v. Montgomery*, 1 Swan, 348; *Town of Pawlet v. Clark et al.*, 9 Cranch, 292; *Burbank et al. v. Whitney*, 24 Pick. 146; *Zimmerman v. Anders*, 6 Watts & Serg. 218; *Amer. Bible Society v. Wetmore*, 17 Conn. 181; *Ingliss v. Sailors' S. H.* 3 Peters, 99; *Ex. of Burr v. Smith*, 7 Vermt. 241; *Bentlett v. Nye*, 4 Metc. 378; *Story's Eq. Jur.* §§ 1144, 1162, 1165, 1169, 1190; *Witman v. Lee*,

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17 Serg. & R. 93; *Bridges v. Pleasants*, 4 Iredell, 27; *Profs. of Shapleigh v. Pillsbury*, 1 Greenl. 271, approved in *Sewall v. Cagill*, 15 Maine, 414.

The exercise of jurisdiction in such cases is not dependent upon the statute of 43 Elizabeth, commonly known as the statute of charitable uses. A different opinion at one time obtained in this country, but since the decision in the celebrated case of *Vidal et al. v. The Executors of Girard*, 2 How. 127, it is generally conceded, that the statute of Elizabeth did not create a new law, but only regulated the jurisdiction—a jurisdiction that was before that time inherent in the court over such subjects. This question was very critically examined in that case, all the leading authorities being discussed, and the common law jurisdiction our charitable trusts antecedent to this statute, fully recognized—the unanimous opinion of the court, being delivered by STORY, J., who at one time entertained a contrary view. Story's Eq. Jur. 1154. Numerous authorities might be adduced in support of this proposition, but the above are regarded as sufficient, especially as it is at this time, seldom if ever seriously controverted. In this country, also, this jurisdiction must be exercised judicially, and not as a prerogative power. If the intention of the donor can be legally executed, whether the gift is to a general charity, or specific object, it will be done; but if this cannot be accomplished, the claim of the heir will not be defeated, by appropriating the property to another and different object.

The chancellor will see that the intention of the grantor is carried out, but he will not give a different direction to the property. Though the deed may clearly manifest a benevolent or charitable disposition, it will only be executed or upheld, for the benefit of the object designed, and will not be, in favor of some other similar object. Courts in this country, in such cases, will execute the will of the benevolent donor, but cannot create an object or person, or class of persons, on whom to confer the gift. We need not add, therefore, that the doctrine of *cy pres*, at least in its original form, as administered in the English courts, has no applica-

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tion here. *Carter et al. v. Balfour's Admr.*, 19 Ala. 821; *Moore's Heirs v. Moore's Devises*, 4 Dana, 354; 4 Wheat. Appendix, note 1; *Curling's Administrators v. Curling's Heirs*, 8 Dana, 38. But, say counsel, this grant must be sustained on the doctrine *cy pres*, or must fail. We do not think that doctrine has anything to do with this case, and are clear that the property descended to the heir, if the deed is to be upheld by that doctrine. In the first place, this is not one of those cases, which have frequently arisen, where courts have had difficulty in administering the trust or charity, because of uncertainty as to the object or beneficiary, or for want of trustees to take and hold the property. The deed is specific as to the name and location of the church—the trustees are named—they accept the trust, and undertake its execution—and a mode is concisely pointed out, in which the succession is to be kept up, in case of death or vacancy from any cause in said board. In this latter respect, the case is clearly different from that of *Stone v. Fuller's Exe.*, 3 Vermt. 400. Since the organization, therefore, of the church, there can be no difficulty in carrying out the intention of the grantor, so far as any objection on the ground of uncertainty in object, is concerned. Neither are we asked, to devote the grant to an object other or different from that designed by the donor, and clearly stated in the deed thereof. We therefore run no hazard in violating his will, if the property can be given to this object. But in carrying out this will, the integrity of the law must be preserved, whatever the consequences. While courts of equity favor such grants, and will not permit the same to fail for the want of trustees, but will supply their places, and guard the execution of the trust, yet legal principles must be preserved, and the rights of parties protected. Shall the will of the donor then, be executed or carried out? If not, why? The answer is, because no beneficiary was *in esse*, at the time of the grant, capable of taking. We have already shown, by reference to a number of authorities (which might be multiplied), that this is not necessary in grants of this character. But it is said, that in all these cases, as well as other similar

ones, the trustees had the power to create the beneficiary—to proceed with the execution of the trust; or that if the beneficiary did not exist in an incorporated form, so as to have power as such, to acquire and hold the grant, there was at least an association or class of persons, who had an existence; and further, that no case can be found similar to this, where the grant was upheld.

In view of these objections, let us examine some of the cases, to ascertain how far the courts of this country have gone in upholding such donations, where these and similar objections have been urged. In the case of the *Town of Shapleigh v. Pillsbury*, 1 Greenl. 271, the view taken of this question, will be sufficiently indicated by the following extract from the opinion by MELLAN, C. J.: "On these facts, it is contended by the counsel for the demandants, in the first place, that the grant by the proprietors in 1780, of the demanded premises, is void, because there was at that time, no person or persons, or corporation, capable in law of taking the estate granted;" and he then proceeds to say: "We are not aware that such grants or donations were ever considered void and inoperative, either before or since the revolution, on the principle, that no person or corporation capable of taking, existed at the time of the grant. Should such a principle be considered sufficient to defeat such grants, it would, in numberless instances, frustrate the benevolent intentions of the legislature, or of generous individuals, in the bestowment of their bounty." In *Rice v. Osgood et al.*, 9 Mass. 88, the part material to this question, will be found in the following extracts from the opinion by SEWALL, J., commencing on page 43: "When the patentee, according to the condition of the grant to him, makes a grant or assignment, the estate vests, where the appropriation is to a person or corporation *in esse*, and is accepted by him, or them; and where contingent, and to a person or corporation not *in esse*, the estate remains in the patentee, until the contingency happens, and then vests, if accepted." In this case, the grant is to trustees, who accepted at the time, and the beneficiary is now claiming the benefit of that acceptance.

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In *Curling's Administrator v. Curling's Heirs*, 8 Dana, 38, the will of James Curling contained the following provision: "And at the decease of my wife, it is my will and desire, that my negro boy Harvey shall cease from slavery, and be emancipated and set free; and that the remaining part of my estate shall be left for the use, privilege, and benefit of a public seminary; that said property shall not be sold, but rented and hired for the purpose aforesaid." The trustees of the Trigg county seminary (where part of the testator's estate was situated), established and organized after the date of the will, were made defendants to the original bill, filed by the heirs, to have this clause in the will declared void. The devise was upheld, and this seminary, so organized, was declared to be the recipient of the testator's bounty. The case of *McGirr v. Aaron*, 1 Penr. & Watts, 49, was of this character: The Rev. T. Bowers, by his will, gave certain real estate to a Roman Catholic priest, who shall succeed me in this said place, to be entailed to him and his successors, in trust, and so left by him to his successors, and so on in trust, for the use therein mentioned, in succession forever. In the course of the opinion, by GIBSON, C. J., it is said, that a devise to an officiating priest and his successors, not being a corporation sole, is against the policy of the law and void, as tending to perpetuity; and that, therefore, if this devise was to be interpreted strictly, according to the meaning of the words, it would be impossible to carry it into effect. The devise was upheld, however, and not allowed to fail for want of trustees, by holding that the devise was for the maintenance of the priest, but in care of the congregation, and consequently for its benefit alone. "Now (says the court), although the congregation was not incorporated at the death of Mr. Bowers, yet, by the decisions of the court, a gift to a charity shall not fail for want of a trustee; but vest as soon as the charity acquired a capacity to take." *The Town of Poulet v. D. Clark et al.*, 9 Cranch, 292, very fully and ably reviews the doctrine of charitable trusts, as also the rights of corporated and unincorporated ecclesiastical bodies. We can do nothing more than give a mere

abstract of so much of the case as bears upon the question now before us. The case involved the construction of, and the rights of parties under, the royal charter of 1761, granted to the township of Pawlet, which gave certain lands, "one share for a glebe for the church of England, as by law established; one share for the first settled minister of the gospel." There was not any church consecrated and established in Pawlet, at the time of the charter, and the inquiry arose, whether, at common law, a grant so made, was wholly void, for want of a corporation having capacity to take. STORY, J., in delivering the opinion, says: "That the land must have passed out of the donors, if at all, without a grantee, by way of public appropriation or dedication to pious uses. In this respect it would form an exception to the generality of the rule, that to make a grant valid, there must be a person *in esse* capable of taking it;" and he concludes that, under such circumstances, until a parson could be inducted into such new church, the fee of its lands would remain in abeyance, or be like the *hereditas pacens* of the Roman Colle, in expectation of an heir. This would conform exactly to the doctrine of the civil law, which as to pious donations, Bracton has not scrupled to affirm, to be the law of England. "Nor (says the learned judge), is this a novel doctrine of the common law." The case of *Beatty & Richie v. Kurtz et al.*, 2 Pet. 556, was briefly this. In 1769, Beatty and Hawkins laid out an addition to the town of Georgetown. On the recorded plan of the town, one lot was marked out, and inscribed with these words, "for the Lutheran Church." Shortly after the appropriation, the Lutherans of Georgetown proceeded to erect on this lot a log house, which was used by them as a place for public worship, and in various other ways exercised ownership over the said lot. They, however, were never incorporated as a religious society, but consisted of a mere voluntary association or society, without any formal records of their proceedings. The question arose, whether the plaintiffs, a committee chosen by this voluntary association, could, for the church, maintain its title to the lot, upon this dedication, as

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one made to pious uses. In reference to this question, it is said, that there was no doubt that the proprietor of the town intended that this lot should be appropriated for the use of a "Lutheran Church," in the town laid off by him. "But as there was not, at that time, any church, either incorporated or unincorporated of that denomination, in that town, there was no grantee capable of taking the same by the grant. If, therefore, it were necessary that there should be a grantee legally capable of taking, in order to support the donation in this case, it would be utterly void at law, and the land might be resumed at pleasure. If the appropriation, therefore, is to be deemed valid at all, it must be upon other principles than those which ordinarily apply between grantor and grantee; and we think, it may be supported as a dedication of a lot to a public and pious use." In Ohio, it is the settled and received law, that a dedication for public, pious, or charitable uses, requires no donee to give it effect (6 Ohio, 308; 7 Ib. 221); and to be equally well settled, that a trust shall never fail for want of a trustee, but that the necessary appointment may be made by the court. *Thornhill and others v. McCandliss*, 6-7 Ohio, 472.

The case of *Winslow v. Cummings et al.*, 3 Cushing, 858, we think, goes further than we are called upon to go in this case. Among the legacies contained in the will of T. S. Winslow, was the following, and expressed in the following words: "To the Marine Bible Society, I give one thousand dollars." There was no society of that name in existence, but at, or shortly before the time of making the will, there was a voluntary association known by the name of "The Boston Young Men's Marine Bible Society," but which, at the time of the testator's death, had been dissolved, or become extinct. The members of this society having afterwards held meetings, and claimed the legacy, their right thereto was the question which arose for adjudication. It was held, that this society was the one intended by the testator, and that as such, it could take the legacy. It was objected that no such society existed at the time of making the will. "As to the want of capacity to take the legacy

(says the court), by reason of having no legal existence as a corporation, that can be readily supplied by the appointment of a trustee, if the object of the legacy, and the particular use to which the testator appropriated it, can be ascertained. It seems to us that these may be ascertained, and that although this society had ceased to continue its regular organization, yet its previous existence, its well-defined objects of charity, and mode of distribution of its funds, may be resorted to, in order to determine the purpose of this legacy, and what disposition of it will effectuate the intention of the testator." 6 Peters, 431. In *The City of Cincinnati v. White*, it is said, that "dedications of land for public purposes, have frequently come under the consideration of this court, and the objections which have been raised against their validity, have been the want of a grantee competent to take the title, applying to them the same rule which prevails in private grants, that there must be a grantee as well as a grantor. But that is not the light in which this court has considered such dedications for public use. The law applies to them rules adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor, and to secure to the public the benefit held out and expected to be derived from, and enjoyed by, the dedication;" and again, that "in this class of cases, there may be instances where, contrary to the general rule, a fee may remain in abeyance, until there is a grantee capable of taking, when the object and purpose of the appropriation look to a future grantee, in which the fee is to vest." This case also affirms, that there is no well-founded distinction, so far as this question is concerned, between dedications for charitable and religious uses, and those of land for the use of a city; but that all alike, form exceptions to the rule applicable to private grants, and grow out of the necessity of the case.

In 2 Kent's Com. (7 ed.) p. 829, in the note, we have a reference to the case of *Milne v. Milne*, 17 Louis. Ch. R. 46, where, according to the note, it was decided under the will of Alexander Milne, in which legacies were left to two pub-

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lic charitable asylums, to be, after the death of the testator, incorporated and established at Milneburgh, that the courts were bound to aid in carrying out the intention of the will. See also, *Executors of Burr v. Smith*, 7 Vermont, 241; *Inglis v. Sailors' Snug Harbor*, 3 Peters, 99. This last case is very much in point, but the length of this opinion forbids that we should refer to it, as its importance would otherwise demand. *American Bible Society v. Wetmore*, 17 Conn. 181; *Zimmerman v. Anders*, 6 Watts & S. 218. In note 2, to section 1190, Story's Eq. Juris., it is said that, "if the object of the gift be certain, but not at present in existence, yet if its existence may be expected hereafter, the court will neither consider the gift lapsed, nor apply it to a different use," citing *Aylet v. Dodd*, 2 Atk. 283; *Attorney-General v. Oglander*, 3 Bro. Ch. 166.

Without referring to further cases in detail, we direct attention to the following, as throwing light upon this question: *Andrew v. New York Bible Society*, 4 Sandf. 178; *The Zanesville Canal and Man. Co. v. McIntyre's Ex.*, 9 Ohio, 203; *The Reformed Dutch Church v. Mott*, 7 Paige, 77; *Zanesville Canal and Man. Co. v. City of Zanesville*, 20 Ohio, 483; *Dickson v. Montgomery*, 1 Swan, 348; *Burbank v. Whitney*, 24 Pick. 146; *Porter's Case*, 1 Coke, 22; *Moggridge v. Thackwell*, 7 Vesey, 36; Bacon's Abrig. title Charitable Uses, E; Willard's Eq. ch. 7, § 15. We think these cases fully sustain and uphold the following, among other propositions: That a court of equity will not permit a trust to fail for want of a trustee. That grants, devises, or dedications to public, pious, or religious uses, from the necessity of the case, form exceptions to the rule, applicable to private grants, requiring a grantee as well as a grantor. That it is not necessary, in such cases, that the beneficiary should, at the time of the grant, be clothed with the power or capacity of taking the benefit of the donor's bounty; but the intention of the donor will be executed, if this capacity arises within a reasonable time thereafter. That, in the meantime, where the property is in the hands of a trustee, and the object and purpose of the grant, look to a future grantee, it will be held in abey-

ance. That it is not necessary that the trustee shall have the power to create the beneficiary, or proceed with the execution of the trust, before such creation, in order to sustain and uphold such a grant or devise; and upon these principles, this grant may most clearly be upheld, and the intention of the grantor carried out.

A brief reference to some other points, made by counsel, and we close this opinion. We are asked, if this grant is sustained, how this court could have ordered its execution, if the church was not now organized? We answer, that in such a case, the grant would not have been upheld. In other words, we could not have given it to a beneficiary, that at the time of the decree, had no capacity to take. But there is a uniform current of authorities, to which there is, perhaps, but little, if any, exception, that if the church, asylum, school, or other object of the charity, shall exist at the time of the grant in an unorganized or unincorporated form, having no capacity as such, to take or hold the property granted, yet the subsequent incorporation will prevent the legacy or grant from lapsing, and enable the court to execute the same; and yet, in such cases, there would be no more power in the court to provide for the execution of the donor's intention, before incorporating, than though the church or school did not previously exist in an unincorporated form.

Again, and finally, was this church endowed with the capacity to take, within such reasonable time, as to enable it to claim the benefit of McKean's bounty? The answer to this inquiry, must always depend upon the circumstances of each case. In this instance, it is a part of the history of the times, that when the deed was made, Keokuk was, like many, if not most, of the towns of this state, just struggling into active existence. It had few inhabitants, and those belonging to the different religious denominations, were in the same proportion, few. As such, their want of ability, immediately to organize, build up, and sustain a separate church, cannot well be doubted. This grant expressly contemplates such want of means, and is designed to assist this

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known and appreciated poverty. It is true, the church might possibly have sooner organized, but this would have given it no greater means, aside from the more immediate use of this grant, to have built a house of worship, or sustained a minister. The testimony shows, that there was, at that time, and for some years thereafter, but few members of this denomination. They attached themselves temporarily with the Presbyterians, and so continued, until having members and strength sufficient, they organized in the manner required by law, and under the peculiar government known to their own church. Under such circumstances, we should be unwilling to treat the delay as unreasonable. To so hold, would be to defeat the intentions of many benevolent individuals, designed to aid in the building up of poor and weak churches and schools, at a time in the history of all new countries, when their aid would be most needed, and accomplish the most good. We conclude, therefore, that this case must be reversed. From the intricacy of the questions involved, we may have misapprehended the law, to the prejudice of the parties, who justly feel so great an interest in this litigation. We have endeavored to view the case in its legal aspect, influenced by a stern sense of duty. If we have erred, we have at least the reflection, that in holding as we have, we have carried out the intention of the deceased, as expressed in his deed, and re-affirmed in his will.

Decree reversed.

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Under the act entitled, "An act to prevent frauds," approved January 16, 1840 (Rev. Stat. 1843, 271), a judgment was a lien on an equitable interest in real estate.

Section thirty-one of the act of 1840, entitled "An act to regulate conveyances," makes a deed valid between the parties, and such as have actual

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notice thereof. The want of the acknowledgment, or of the proof which may authorize the admission of the deed to record, does not invalidate the deed as between the grantor and grantee, and is good as to all persons who are charged with such notice.

The acknowledgment and record of the deed, are provisions which the law makes for the security of creditors and purchasers—they are not essential to the validity of the deed as to the grantor.

Where in an action of right, the plaintiff claimed title to the premises under a deed from one I., dated March 13, 1853, and where the defendant claimed title under a judgment in the District Court against W. and R., rendered October 26, 1841, a sale of the premises on execution, as the property of W., and a sheriff's deed, dated May 6, 1843, and showed by the testimony of W., that he purchased the premises of I.; that I. conveyed to him by warranty deed; and that W. afterwards (March 31, 1842) conveyed to B., T. & B., of St. Louis, of which firm the plaintiff was a partner, and delivered to their agent, the deed from I. to himself, to be placed upon record; and where the defendant further proved by I., that he sold the premises to W. about the year 1841 or 1842, and thinks that he conveyed the same by deed; that witness afterwards, at the request of B., T. & B., took up the deed he had made to W.—the same never having been recorded—and made a deed directly to B., T. & B., dated February 25, 1843; that the deed to W. is lost, or was destroyed by the witness, and never was upon record; and that in March, 1853, he executed the deed given in evidence by plaintiff; and where the plaintiff, to rebut this testimony, gave in evidence the deed from W. to B., T. & B., dated March 31, 1842, and the deed from I. to them, dated February, 25, 1843, and proved that B., T. & B. obtained the deed from I. directly to themselves, to save circuitry of title through W., and that in the spring of 1853, the plaintiff finding a defect in the acknowledgment of the deed from I. to B., T. & B., and being the survivor of the partnership, which had been dissolved, procured from I. the deed, dated March 13, 1853, to be made directly to himself; and where upon this state of evidence, the court instructed the jury, that the plaintiff was entitled to recover, unless the title of defendant founded on the judgment against W. & R. related back to the date of the judgment, October 26, 1841; and that before it could so relate back, they must find that W. had a deed from I. conveying to him the legal title to the premises in controversy, for a valuable consideration, duly executed and acknowledged, at or before the date of said judgment; *Held*, That the court erred in requiring the defendant to show that the deed from I. to W. had been acknowledged.

Appeal from the Des Moines District Court.

THIS is an action of right brought by Blain, to recover of Stewart the south half of lot 212 in Burlington. Thomas M. Isett purchased the lot of the United States, February 2d, 1841, and on the 13th March, 1853, conveyed the south

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half of the same to the plaintiff. The defendant had been several years in possession of the premises, at the time of the commencement of the suit. The plaintiff having shown these facts on the trial, rested his case. The defendant claims title under a judgment in the District Court of Des Moines county, in favor of Hood & Abbott, against Webber & Remey, rendered October 26th, 1841. On an execution issued on this judgment, the sheriff sold the half lot in controversy, as the property of Webber, and defendant became the purchaser and received a sheriff's deed, May 6th, 1843. The defendant shows by the testimony of Webber, that he (Webber) purchased the half lot of Isett, paying him therefor "a horse, saddle, and bridle"—and that Isett conveyed to him by warranty deed. Webber afterwards (March 31st, 1842) conveyed the premises to Blain, Tomkins & Barrett, of St. Louis, and delivered to their agent and attorney, the deed to himself from Isett, to be placed upon record. Isett deposes that he sold the premises in dispute to Webber, "about the year 1841 or 1842," and thinks that he conveyed the same by deed; that he afterwards, at the request of Blain, Tomkins & Barrett, by their attorney, took up the deed he had made to Webber, the same never having been recorded, and made a deed directly to Blain, Tomkins & Barrett, dated February 25th, 1843. The deed to Webber is lost, or was destroyed by Isett, and never was on record. His deposition further shows, that on March 18th, 1853, he executed the deed given in evidence by plaintiff, who was one of the partnership firm of Blain, Tomkins & Barrett.

The plaintiff, as rebutting testimony, gave, in evidence, the deed from Webber to Blain, Tomkins & Barrett, dated March 31st, 1842, and the deed from Isett to them, dated February 25th, 1843. It further appeared, that Blain, Tomkins & Barrett, obtained the deed from Isett directly to themselves to save circuitry of title through Webber, and that in the spring of 1853, the plaintiff finding a defect in the acknowledgment of the deed from Isett to Blain, Tomkins & Barrett, and being the survivor of the partnership firm, which had been dissolved, procured from Isett the deed,

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dated March 18th, 1853, to be made directly to himself. Upon this state of evidence, the District Court instructed the jury that the plaintiff was entitled to recover, unless the title of defendant, founded on the judgment of Hood & Abbott against Webber & Remey, related back to the date of the judgment, October 26th, 1841; and that before it could so relate back, they must find that Webber had a deed from Isett, conveying to him the legal title to the premises in controversy, for a valuable consideration, duly executed, and acknowledged, at or before the date of said judgment; and that if Webber's deed was executed subsequent to the date of the judgment, then the judgment could be no lien in law, so as to take the property from the defendant. The court further charged the jury, that if Webber's deed from Isett was duly executed and acknowledged, but never placed upon record, still, before the judgment could operate as a lien against plaintiff, they must find that the plaintiff had notice of such unrecorded deed, in the possession of Webber. The jury found a verdict for the plaintiff, and the defendant has appealed, and assigns for error, the instructions given to the jury by the court.

Browning & Tracey, for the appellant.

Starr & Phelps, for the appellee.

STOCKTON, J.—The errors assigned in this cause, question the correctness of the instructions to the jury in the court below. The first question presented for our decision is, whether, under the act of January 16th, 1840 (Session Acts, 76), the judgment was a lien on an equitable interest in real estate. On this point, it is sufficient for us to refer to the act of January 19th, 1839 (Laws of Iowa, 74), concerning the construction of statutes. Under the ninth clause of the fifth section of that act, the term "real estate" must be construed "to include lands, tenements, and hereditaments, and all rights thereto, and interest therein." We infer from

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this language, that the judgment was made a lien on equitable, as well as legal, interests in real estate. We are confirmed in this view, by the action of the legislature, in the act of January 19th, 1846 (Session Acts, 33), which declares that no judgment in the District Court, "shall be a lien on the equitable interest of the defendant in real estate, unless said equitable interest appears of record in the county wherein said real estate is situated." This act, from the time of taking effect, confined the lien of the judgment to the legal interest, and such equitable interest as should appear of record in the county. The question as to the lien of the judgment on after acquired lands, has been settled by the decision of this court, in the case of *Harrington v. Sharpe*, 1 G. Greene, 131, and in the case of *Woods v. Mains*, 1 G. Greene, 275.

The only other question for us to decide is, whether the court below erred in instructing the jury, that before the title of the defendant, Stewart, could relate back to the date of the judgment of Hood & Abbott, against Webber & Remey, or be regarded as a better title than that of the plaintiff, they must find that Webber had a deed from Isett, conveying to him the legal title to the premises in dispute, for a valuable consideration, duly executed and acknowledged, at or before the date of said judgment. We are of opinion, that this instruction of the court, based as it was on the proposition that the deed from Isett to Webber, was invalid unless acknowledged, went too far, and required too much of the defendant. The deed may have been perfect in all its parts, and may have passed the complete legal title to Webber, without being acknowledged. It was certainly necessary for the defendant, in order to make out his case, to show a conveyance from Isett to Webber, of such title to the premises in dispute, as that the judgment under which he claims, should be a lien upon it; and if the deed was not recorded, as the law requires, it was further necessary that he should charge the defendant with notice of such unrecorded deed. But when the defendant has done this much, he has done all that the law requires of him. The acknowledgment was

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only necessary to admit the deed to record, and the only effect of recording, is to dispense with notice to the plaintiff. The statute of Iowa (act of 1840, § 81), makes the deed valid between the parties, and such as have actual notice thereof. The want of the acknowledgment, or of the proof which may authorize the admission of the deed to record, does not invalidate the deed as between the grantor and grantee; and it is good as to all persons who are charged with such notice. The acknowledgment and recording of the deed, are provisions which the law makes for the security of creditors and purchasers. They are not essential to the validity of the deed, as to the grantor. *Lessee of Sicard v. Davis, &c.*, 6 Peters, 135.

We can, therefore, come to no other conclusion, than that the District Court erred in requiring the defendant to show that the deed from Isett to Webber, had been acknowledged. A conveyance from Isett was valid, and passed the legal title to Webber, without acknowledgment. Isett may have parted with all his interest, and the same may have become wholly and completely vested in Webber, without an acknowledgment of the deed. It is, however, contended by the counsel for plaintiff, that the judgment of the District Court should not be reversed, even if there was error in the instruction of the court, as to the acknowledgment of the deed, because that point was immaterial, and if the instruction of the court had been to the effect that the deed was valid without acknowledgment, the verdict of the jury must still have been the same. It is true, that a judgment will not be reversed for an erroneous instruction by the court below, on an immaterial point. But we cannot undertake to say, that the question was immaterial to the issue of the cause, nor that the verdict of the jury might not have been different, had the proper effect been given by the instructions of the court, to the unacknowledged deed. The burden of proof lay on the defendant, to show a title or interest in the premises in Webber, on which the judgment was a lien. Isett is the only witness whose testimony goes to this point, and he says that the sale to Webber was "about the year 1841 or 1842." The ques-

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tion of time was, therefore, one for the jury to decide, and we cannot say that they might not have found from this evidence, that Webber had an interest in the premises on which the judgment was a lien at the time of its rendition; nor, if they had so found, that it would have been the duty of the court to disturb the verdict.

The judgment is reversed.

BELL & Co. v. THOMAS.

Where a subsequent mortgagee has actual notice of a prior existing mortgage on the same premises, it is immaterial which was first recorded.

And where two mortgages on the same premises, were executed on the same day, one of which was filed for record, as appeared from the certificate on the mortgage, half an hour before the other; and where it appeared from the testimony of the mortgagor and others, that the mortgage last recorded, was first executed, and that the second mortgagee had actual notice of the execution of the first mortgage; *Held*, That the first mortgagee had a priority of lien.

Appeal from the Alameda District Court.

THE petition in this case states, in substance, that on the 11th of February, 1853, James Peacock made his note to plaintiff for \$555, due in twelve months, with fifteen per cent. interest, and executed and delivered to plaintiff at the same time, a mortgage of lot No. 5, in block No. 4, section No. 1, in the village of Lansing, to secure the same; that on the same day, Peacock being indebted to the defendant, executed a mortgage of the same property, and delivered the same to defendant, to secure said indebtedness; that the defendant received the same with notice of the plaintiff's mortgage; that it was agreed between Peacock, plaintiff, and defendant, that plaintiff's mortgage should have priority, and that defendant should take his mortgage subject to plaintiff's; that on the

same day said mortgages were delivered to the recorder of deeds of Alamakee county, at the same time, to wit, at half-past twelve o'clock in the afternoon, to be recorded; that the said mortgage to defendant was placed first on the record; that defendant has ordered a foreclosure of his mortgage by the sheriff of said county, and inasmuch as both said mortgages were filed for record at the same time, the purchaser under the sale about to be made on the defendant's mortgage, cannot by the records alone have such notice of the priority of the said mortgage of plaintiff, as will bind him; and that unless the sheriff is restricted by an order of court, there is danger that he will pay to the defendant the amount of his lien, out of the proceeds of the sale of said land, without first supplying plaintiff's mortgage. A copy of the note and mortgage, are annexed and made part of the petition, and petitioner asks that his mortgage may be declared a lien prior to defendant's, and that the sheriff be ordered to pay off plaintiff's mortgage before paying over any money to defendant, and for general relief.

The defendant answers, admitting the execution of the note to petitioner; the execution and delivery to him of the mortgage; and the execution of the mortgage to defendant; but denies that the mortgage to plaintiff was first executed, acknowledged, and delivered; or before the mortgage to defendant was executed, acknowledged, and delivered; that defendant's mortgage was received, with notice of plaintiff's; that it was agreed between Peacock, plaintiff, and defendant, that the mortgage to plaintiff was to have priority; that plaintiff's mortgage was delivered to the recorder of deeds, to be recorded before defendant's; avers, that defendant's was delivered first for record, and was recorded first; that plaintiff knew that Peacock was indebted to defendant, and that at the time of his taking his said mortgage, knew that defendant was seeking to secure his said demand; and prays that the priority of the defendant's lien be confirmed, and for general relief. The petitioner replies, reaffirming the allegations in his petition, and denying that defendant's mortgage was delivered first for record.

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The evidence consists of the deposition of Peacock, the mortgagor; a statement of one Camp, the attorney, who drew the mortgages, and the affidavit of one Conkey, who was acting as recorder, at the time the mortgages were filed for record, and the mortgages, which are made exhibits in the case. Peacock testifies, that John Coats took the mortgage on behalf of plaintiff; that he did not on the same day execute the mortgage to defendant, but did the day following; that a Mr. Work took the mortgage for defendant; that Work told witness that Coats was going to get his mortgage recorded first, and that it was so agreed between them; that while all three were present, Coats told Work, that he had a right, being he came the day before, to have his done and fixed right; Coats agreed to take the storehouse and lot, and Work the other two lots; they agreed on that, and fixed it; Coats told him he did not wish to have any racing done about the recording; they agreed to go together to the recorder's office, and Coats was to get his mortgage recorded first. When witness and Work were together, Work told witness that it was agreed between him and Coats, for plaintiff, that Coats should have his mortgage recorded first. The way it happened that Work got the same property into his mortgage, that Coats had in his, was by force, against my consent. The original agreement between Work and myself was, that he was simply to have the lots. When all three were present, Work said he would let John (Coats) have his recorded first; he did not wish to have any fuss; he came up there and wanted to have all done right. Witness owed plaintiff for goods bought of plaintiff at the time the mortgage was given. The statement of Camp, which was received as testimony by agreement, is in substance, that some time in the winter of 1852-'3, John Coats, of Dubuque, and one of the firm of John Bell & Co., came into my office, in company with James Peacock, of Lansing. Mr. Peacock stated that he wanted to give Mr. Coats a mortgage in favor of John Bell & Co., to secure a debt which the said Peacock owed the said Bell & Co. Coats said, if I would give him a blank mortgage, he would

fill it out. I gave him a blank. And on the same, or the next day, Mr. Coats again came into the office, in company with one Mr. Work, of Dubuque, and I think (though I am not certain), Mr. Peacock. Mr. Coats then asked me to draw a mortgage in favor of John Bell & Co. I drew the mortgage, and Mr. Coats took it and left the office; Mr. Work then asked me to draw a like mortgage in favor of J. B. Thomas, and upon the same property. I proceeded to draw the mortgage (after or during the time I was drawing it), informing Mr. Work that he must take the mortgage, subject to the prior mortgage of Bell & Co. I do not recollect that he made any reply, but think he answered that he was aware of it, and took the mortgage and left the office. Said Camp further states, that he was present when Coats and Peacock were holding a conversation in regard to securing the claim of Bell & Co., and Mr. Peacock said he would give Bell & Co. a mortgage on his place in Lansing, and directed me to draw the mortgage. At this time Mr. Thomas's claim had not been mentioned, and I think Mr. Work was not in Lansing; if so, I had not seen him. The mortgages were taken from my office, without acknowledgment. I was not present at the time they were acknowledged. The testimony of O. S. Conkey, in an affidavit which was read in evidence, by consent, is as follows: That on the 11th day of February, 1853, while he was acting as recorder of deeds, of Alameda county, two persons came to the recorder's office, and handed him each a mortgage to file for record. One was a mortgage from James Peacock to John Bell & Co., and the other from James Peacock to J. B. Thomas; and affiant understood from the persons, that both mortgages covered in part the same property. It was agreed by these persons, while there in affiant's presence, that one of said mortgages should be recorded before the other; that the mortgage to be recorded first, should be marked filed at twelve o'clock, and the other mortgage should be marked filed at half-past twelve o'clock; affiant thereupon picked up one mortgage, and marked it, filed at twelve o'clock; and thereupon picked up the other, and marked it, filed at half-

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past twelve o'clock. It was then observed by the persons, that affiant had made a mistake, and marked the mortgages in regard to filing wrong; and affiant thereupon in the presence of the parties, and by their consent, proceeded to erase and alter the time as marked on said mortgages, and that is the way the erasures came to appear upon the mortgages. The mortgage marked filed at twelve o'clock, was to be recorded first, as agreed between said parties. The exhibits appended to the bill and answer, show that plaintiffs' mortgage was filed at half-past twelve o'clock, on the 11th day of February, 1853, and that of defendant at twelve. Both mortgages bear date, February 11th, 1853, and appear to have been acknowledged and filed for record on the same day. The note to plaintiff bears the same date. Under this state of pleadings and facts, the bill was dismissed by the District Court, from which plaintiff appeals.

Smith, McKinlay & Poor, for the appellants, filed the following brief:

This cause presents in fact but one point, and that is, whether J. B. Thomas took his mortgage from James Peacock, with notice of the existence of a prior mortgage to John Bell & Co. For proof that defendant had such notice, the plaintiff refers to the testimony of Camp and Peacock.

For the law governing the case, the plaintiff refers to the Code, § 1211. Also, to the case of *Dunham v. Day*, 15 Johns. 567, where the court hold the following language: "By a *bona fide* purchaser, I understand the statute to mean a person who buys without knowledge of the prior mortgage, and who would in fact be defrauded, if such prior incumbrance were to stand in opposition to his title. The manifest object of the statute was, to protect purchasers against prior secret conveyances of which such subsequent purchasers had no notice." "Notice supercedes registry, because it effects the same object, which is to apprise the purchaser of the prior incumbrances." See, also, the case of *Le Neve v. Le Neve*, 3 Atkins, 646, where the court (Lord

Hardwick) said it would be a most mischievous thing, if a person taking the advantage of the legal form appointed by an act of Parliament, might under that, protect himself against a person who had a prior equity, of which he had notice. 2 *Leading Cases in Equity*, 97; Notes to case of *Le Neve v. Le Neve*; *Jackson v. Neely*, 10 Johns. 374. In the case of *Jackson v. Valkenburg*, 8 Cowen, 260, the court say, that when a mortgage is given, the mortgagee being expressly informed of the existence of a previous mortgage, and understanding that he is to take his mortgage subject to the previous one, he is affected by this notice, though the previous mortgage be not registered. 2 *Hilliard on Mortgages*, 253; *Jackson v. Leek*, 19 Wend. 339; *Jackson v. Sharp*, 9 Johns. 163; *Porter v. Cole*, 4 Maine, 20; *Farnsworth v. Childs*, 4 Mass. 637; *Correy v. Caxton*, 4 Binney, 140; *Solms v. McCulloch*, 5 Penn. 472; *Van Meter v. McFaddin*, 8 B. Monroe, 442; 8 Alabama, 866; 9 S. & M. 34; 4 Scam. 117; 16 Alab. 28.

Wm. Vandever, for the appellee, after reviewing the testimony, argued:

We come now to consider the claim for priority, which is based upon notice. Here are two creditors seeking to secure their respective debts. Each is aware that the other is seeking to secure himself; one by his superior diligence, acquires a priority of right, and upon the debt falling due, he proceeds to collect by foreclosure of the mortgaged premises; the other, then, whose debt is not due for many months to come, steps in and endeavors to disarm him by the aid of this court. Will this court thus step in at the bidding of plaintiff, and decree preferences among creditors. There is no fraud on our part. Neither party stands upon the ground of a purchaser for valuable consideration, so as to be affected by notice. The consideration in each mortgage is an antecedent debt, contracted long before notice, and the doctrine of "*qui prior est tempore potior est*," must prevail. *Warden v. Adams*, 15 Mass. 233; 2 *Pow. on Mortgages*, 631 and note; *Muse v. Litterman*, 13 *Serg. & Rawle*, 167; 1 *Dev.*

Eq. 470; 2 W. & T. Eq. Cas. 110; *Cushing v. Hurd*, 4 Pick. 255; 2 Lead. Cases in Eq. 77.

If the doctrine as contended for by appellant, in his argument, is to be applied as between creditors seeking to secure their debts; if, in fact, for one man to proceed to secure his debt against an insolvent, whom he knows to be indebted to others, by taking a mortgage, is a fraud upon other creditors, then indeed, by the same reasoning, it would have been fraudulent for us, to have proceeded by attachment against Peacock, without first having got the consent of Bell. This, in effect, is the doctrine contended for on the other side. It is a maxim, that where equities are equal, the first in time, must prevail. The circumstances of this case, disclose the fact beyond controversy, that our equity is at least equal to theirs; and beyond controversy, we are first in time. Our debt matured first, and our mortgage had priority of registry. We are first, then, in right. 4 Kent Com. 173; 10 Peters, 210. What, in fact, is the relief which appellant seeks in this case? Our right is certainly, in equity, as good as his, yet he says by his argument, that it is a fraud upon him, for the court to allow us take the advantage of our superior diligence; and what relief does he ask from this court, not that the mortgages shall be declared simultaneous, but that he shall be allowed to commit a fraud upon us, by taking away our rights. This we are satisfied the court cannot permit.

The plaintiff nowhere alleges in his bill, that he is remediless at law. It may be that Peacock has abundant other means from which Bell & Co. could satisfy their claim. There is nothing to prevent Bell & Co. from having sued upon these notes, and recovered judgment and ultimate satisfaction of their debt. They ask the court to allow them to take the benefit of our diligence, and when we have collected the money, the prayer of their petition is, that we be required to pay them their debt. In fact, they would stand with folded arms, and take the benefit of our diligence. There is no equity in their bill, and we respectfully submit that the court below did not err in dismissing it.

ISBELL, J.—Before entering upon the consideration of the issues raised by the pleadings in this case, we wish to remark in relation to the testimony of the witness Conkey, with regard to an agreement as to which of these mortgages were to be first filed for record, that we are not at liberty to view the evidence of this agreement, in the light in which defendant insists that it must be viewed. We can consider this agreement, only as a circumstance tending to show that defendant's mortgage was first executed, and not as a valid agreement, whereby the priority of plaintiff's lien may be affected, provided that defendant's mortgage was subsequently executed, with notice to him of plaintiff's prior lien. The reason of this is, that defendant has not by his answer, tendered any such issue as that, although plaintiff's mortgage was first executed, yet it was agreed between the parties, that defendant's should have priority of lien. Had such issue been tendered to plaintiff, he might perhaps have been ready with proof to meet it. Not being tendered, it was not incumbent upon him to be so. The issues made by the pleadings, are those only which the court can determine. Had such an issue been made, the evidence of Conkey should be viewed in a different light than it can now be viewed. We think the legitimate questions that arise from the pleadings are, has the plaintiff shown by the evidence, that his mortgage was first executed, and that defendant took his mortgage with notice of plaintiff's lien?

However the rights of *bona fide* purchasers might be affected, on account of the defendant's mortgage being first recorded, as between the immediate parties, we cannot regard it very material in a court of equity which was first recorded, provided the party procuring his to be first recorded, had actual notice of the existence of the mortgage of the other party, at the time of procuring his, and causing it to be recorded. The mortgage of defendant, bearing the same date with that of plaintiff, and bearing filing for record a half hour previous to that of plaintiff, in the absence of other proof, raises the presumption that defendant's was first exe-

cuted. To overcome this presumption, the burden of proof rests with the plaintiff.

Has he shown that his mortgage was, in point of fact, first executed? We can arrive at no other conclusion than that he has. The mortgagor distinctly swears to this, and the statement of Camp, which is received in evidence by agreement, shows that defendant's mortgage was subsequently drawn; and the inference is quite irresistible, from this statement, that it was drawn while plaintiff was procuring his to be executed. The answer, not being upon oath, the testimony of these witnesses leaves the fact almost unquestionably proved. With regard to the fact, as to whether the defendant had notice of the execution of plaintiff's mortgage, at the time of the execution of defendant's, we think the evidence is quite conclusive.

These facts existing, plaintiff had unquestionably a priority of lien. Having proved them to exist, the presumption arising from the date of filing for record, was overcome, and a *prima facie* case made out for plaintiff. To overcome this, it was competent for the defendant, in his answer, if it were the fact, that plaintiff had divested himself of this right of priority by agreement, to have confessed notice, and avoided, by setting up the agreement. He did not choose to do so, and we are to try the issues joined by the parties. It would be fully as proper, if we so believed from the evidence, which we are strongly inclined to believe, and which reconciles all the evidence in the case, to hold that a mistake was made in giving directions to the recorder, the plaintiff not having set up a claim of this kind in his bill, as to hold that plaintiff's priority of lien, had been divested by an agreement, the defendant not having set up this claim in his answer. We conclude, therefore, that the equity of the case is with the complainant. The decree of the District Court will be reversed, and a decree entered in this court in accordance with the prayer of the petition.

CENTER v. SPRING.

Where the plaintiff brought an action against the defendant, charging the latter with having commenced a prosecution for larceny against him, and alleging that said prosecution was wrongful, and without any probable cause; that plaintiff was put to great trouble and expense in defending himself against said charge; that he was arrested and held in confinement under the warrant issued in said prosecution; and that he suffered great damage and injury by the said wrongful act of the said defendant; *Held*, That the action, though it need not have a technical name, must be governed by those rules and principles which obtain in actions for malicious prosecutions.

Where in such an action, the defendant asked the court to instruct the jury, "that before the plaintiff can maintain *this action*, he must prove that the prosecution was malicious, and without probable cause," which instruction the court modified, by saying, that "such proof was necessary in order to maintain an action for malicious prosecution;" *Held*, That the court erred in thus modifying the instruction.

It is the duty of the court, to determine the character of the action—by what rules and principles it is to be governed—and not leave it uncertain and confused, whether the law it is enunciating applies to the case at bar, or some other.

Where in an action for malicious prosecution, the defendant asked the court to instruct the jury, "that if defendant has shown that he acted under the advice of counsel, malice cannot be inferred from the want of probable cause," which instruction was refused; *Held*, That the instruction was properly refused.

And where in such an action, the defendant asked the court to instruct the jury as follows: "That if the jury find from the evidence, that the defendant acted upon the advice and opinion of counsel, given upon a fair statement of the real facts and circumstances in the case, they will find for the defendant," which instruction the court refused to give; *Held*, That the instruction was improperly refused.

But where the defendant misrepresents the facts to the counsel whom he consults; or where he does not act in good faith under the advice received; or where he does not himself believe that there is cause for the prosecution; or where counsel and client act in bad faith in originating and bringing the action, he will not be protected by the advice of counsel; and in such cases, the *bona fides* of his conduct, is a question of fact for the jury.

To sustain an action for malicious prosecution, the plaintiff must show that the prosecution originated in the malice of the prosecutor, and without probable cause.

To prove express malice even, is not sufficient, unless the want of probable cause, is also shown.

2	393
82	693
89	793
2	393
29	713
9	393
103	504
2	393
122	393
2	393
137	157
2	393
142	693
2	393
144	93

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The want of probable cause, cannot be inferred from express malice, but malice may be implied from want of probable cause.

The question of probable cause, is a mixed one of fact and law, involving two distinct considerations, to be determined by two different tribunals. The sufficiency of the circumstances to constitute probable cause, is a question of law for the court; and the evidence of the circumstances, is for the determination of the jury.

Malice is, in all cases, a question of fact for the jury, and may be either express or implied.

Appeal from the Muscatine District Court.

IN May, 1854, Spring appeared before a justice of the peace, and made an affidavit in due form, charging Center with the crime of larceny. A warrant was issued, upon which the accused was arrested, brought before the justice, and after hearing, was discharged. Center then brought this action, charging that said prosecution was wrongful, and without any probable cause; that he was put to great trouble and expense in defending himself against said charge; that he was arrested and held in confinement under said warrant, and suffered great damage and injury by the said wrongful act of the defendant, for which he claims the sum of one thousand dollars. In his answer, defendant admits the making of the affidavit; the issuing of the warrant, and plaintiff's arrest; but denies that the affidavit was made wrongfully, or without probable cause. The answer then proceeds to state, among other things, that defendant acted upon the information and advice of others, who professed to be acquainted with circumstances showing the plaintiff's guilt. To this part of the answer, there was a demurrer, for the reason that it did not show that the defendant acted upon the advice of counsel, given upon a full statement of all the facts; and that he was not justified in acting upon the advice of any other than counsel learned in the law. This demurrer was sustained, and defendant amended his answer, setting forth that he had, before making said affidavit, made a full statement of the facts and circumstances to counsel; that such counsel advised the arrest of said plaintiff; and that upon such advice, without malice, he made the affidavit.

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The replication denies that defendant ever advised with counsel as alleged in the answer; and avers, that if he did, it was upon a statement of facts not true, but other and different from those proved on the trial. This is denied by the rejoinder of defendant.

On the trial, the court, at the request of plaintiff, and against defendant's objection, instructed the jury, "that it is no answer to the action, that the defendant acted upon the opinion of counsel, if the statement of facts upon which the opinion was founded, was incorrect, or the opinion itself unwarranted;" and refused the following instructions, asked by defendant: "If defendant has shown that he acted under the advice of counsel, malice cannot be inferred from the want of probable cause." "If the jury find, from the evidence, that the defendant acted upon the advice and opinion of counsel, given upon a fair statement of the real facts and circumstances in the case, they will find for the defendant." It also appears that the defendant asked the court to charge the jury, that before the plaintiff could maintain his (this) action, he must prove that the prosecution was malicious, and without probable cause. This the court modified by saying, that the proof was necessary in order to maintain an action for a malicious prosecution; and in other instances, where defendant asked instructions referring to this action, the same are so modified by the court, as to apply to an action for a malicious prosecution—to all which defendant, at the time, excepted. Verdict for plaintiff. Motions in arrest and for a new trial, overruled—judgment on the verdict, and defendant appeals.

J. Scott Richman, for the appellant.

This was an action (technically) for malicious prosecution, and not for false imprisonment. The distinction between the two, is plainly marked. See 1 Taunt. 498 to 551; 1 Sand. 228; Bull. N. P. 11; Chit. Bl. Com. 126, note 21. As to what is a malicious prosecution, see 2 Devereux, 370. As to what is a false imprisonment, see same authorities, and 1 Chit. Pr. 48. The former is, where the process is regular

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and legal, and no objection is taken to it on account of irregularity, but where the party is innocent. The latter is, where there is no process whatever, or under color of process, wholly illegal, without regard to the question whether any crime has been committed. The remedy, in one case, was trespass, and the other case, under the old system. Now, although the Code has abolished the names of actions, it is still necessary to refer to the old system, to ascertain whether a person has a cause of action, and as to the evidence necessary to support it. This may be material in forming a judgment upon some of the errors assigned. It will be noticed, that in some of the instructions asked, the defendant asked them in this form: "The plaintiff, in order to maintain this action, must, &c." Wherever this was the case, the court modified the instruction, by striking out the words, "this action" and inserting "an action for malicious prosecution;" and then in the charge of the court to the jury, the court says: "This suit is not necessarily an action for malicious prosecution, as known, &c., but is, in fact, for the purposes of recovering such damages, if any, that he has sustained, caused by the alleged wrongful acts of the defendant, and you are to find, from the evidence, whether the defendant committed the wrongful acts complained of, whether the plaintiff has been damaged by such acts, and the amount of such damages."

Now, we submit, that the above is not law, and was calculated to mislead the jury, by causing them to believe that "this action" could be maintained by evidence, which would not sustain an action for "malicious prosecution;" and that, although in an action for "malicious prosecution," malice and the want of probable cause, must concur, in this action for damages, as the court called it, they had only to inquire whether the defendant did the wrongful acts complained of, and if so, what was plaintiff's damage, without regard to any excuse or justification which the defendant might offer.

And here, I wish to make the point, whether a party has not the right to have instructions asked by him, either given

or refused in the form he asks them; and whether the court has the power to make them pointless, by the whittling process of modification? The alteration of one word, or, rather, the substitution of one word for another, very often has the effect, although seemingly immaterial, to paralyze the whole effect of an instruction. This is all that will be presented upon the question of modification of instructions by the court; and this relates to the second and third errors assigned.

The first error assigned, is, that the court erred in refusing the fourth and ninth instructions asked by defendant. They were as follows:

4. "If defendant has shown that he acted under the advice of counsel, malice cannot be inferred from the want of probable cause."

9. "If the jury find from the evidence, that the defendant acted under the advice of counsel, given upon a fair statement of the real facts and circumstances in the case, they will find for the defendant."

These instructions were refused absolutely, and that, too, when the issue had been narrowed down to the fact, whether the defendant had acted under the advice of counsel, or not. Now, one of two things must be true: 1. Either that the issue made by the pleadings was immaterial; or, 2. That the court erred in refusing the fourth and ninth instructions of defendant. Assuming, then, for the sake of the argument, that the issue was immaterial, then the court erred in not awarding a repleader, upon the motion of defendant. Tidd's Pr. 813; Com. Dig. Pleader, R. 18; Bac. Abr. Pleas, M. 18; 2 Saund. 20; 1 Chitty's Pleading, 632. An immaterial issue determines nothing, and a verdict found upon one is of no force. A judgment cannot be rendered upon it.

But was the issue immaterial? If a person act under the advice of counsel fairly obtained, will that excuse him for a prosecution which is not sustained by evidence? If it does not, then, by the criminal records of the country, nine-tenths of all the prosecutions commenced, subject the informant, however laudable his motive in commencing a prosecution,

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to an action for malicious prosecution. But, that acting *bona fide*, upon an opinion fairly obtained, will excuse a person, the court is referred to the following authorities: *Ravenga v. McIntosh*, 9 Eng. Com. Law, 225; *Leigh v. Webb*, 3 Espinasse, 165; *Haywood v. Cuthbert*, 4 McCord, 354; *McNeely v. Driskell*, 2 Blackford, 259; *Bennett v. Black*, 1 Stewart, 495. And more especially, as more directly in point, the following: *Snow v. Allen*, 1 Starkie, 502; *Hall v. Suydam*, 6 Barbour, 84; *Blunt v. Little*, 3 Mason, 102; *Willis v. Noyes*, 12 Pickering, 324; *Wilder v. Holden*, 24 Ib. 8; *Stone v. Swift*, 4 Ib. 389; *Sevens v. Fassett*, 27 Maine, 267; *Turner v. Walker*, 3 Gill and Johnson, 378; *Hall v. Hawkins*, 5 Humphreys, 357; *Somner v. Will*, 4 Serg. & Rawle, 19; 5 B. Monroe, 544; 11 Alabama, 916; 13 Ib. 311; 17 Ib. 27. If these authorities be law, then the court ought to have given the instructions asked by defendant.

The fourth error assigned is, that the court erred in giving the instructions asked by plaintiff. The objection to these instructions is general, and not specific, and is simply, that they, or some of them, conflict with law, and with the instructions given on the other side. The objections urged, however, relate more particularly to the 3d, 5th, 6th, 7th, 8th, and 12th. As to the last instruction being erroneous, I refer to *Adams v. Lisher*, 3 Blackford, 445, as showing that an acquittal of the accused, is not even *prima facie* evidence for him, in a case of this kind. The fifth error is, as to the charge given by the court. This is sufficiently referred to in the opening of the argument. The sixth error, in refusing to arrest the judgment, and award a repleader, has also been referred to. The seventh is, in refusing to grant a new trial. Ought a new trial to have been granted? In support of this error, I shall not stop to cite authorities. The pleadings show, that there was a demurrer sustained to defendant's first answer. That demurrer was specific, as it is required to be by the Code, and pointed out the only thing which would excuse defendant. So the court ruled at all events; and that was, that he must have acted upon the advice of counsel. Defendant seeks to accommodate

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himself to the court, and to the plaintiff, and amends the answer to accord with their views, at one term of the court, by saying that he did act upon the advice of counsel, fairly obtained, &c. Upon this, plaintiff takes issue; and goes to the jury on that issue; and when it is found, at the next term of the court, that the defendant can prove, and does prove, the fact, that he acted upon advice of counsel fairly obtained, as set forth in his 9th instruction, the court and the plaintiff, both change their views of the law, and the court refuses the instructions asked by defendant on that issue, and at plaintiff's suggestion, charges in substance, that having obtained counsel is no defence, if the opinion of counsel be erroneous; or, as it affected the jury, that the opinion was good for nothing, and did not excuse, unless it resulted in the conviction of defendant. This was a trick of the opposite party, if not of the court. 11 Mod. 141. No amount of reasoning, can reconcile this matter. The action of the court, and of plaintiff's attorneys, was calculated to, and did, deceive and mislead the defendant, the jury, and every one else. The particular reasons for a new trial, are set forth in the motion, embodied in the bill of exceptions, to which the court is referred.

Cloud & O'Connor and *J. Butler*, for the appellee.

In reply to the first position of appellant, that the action of the plaintiff below, was "technically" for "malicious prosecution," and not for "false imprisonment," we take leave to say, that it was *technically* neither the one nor the other. It is simply and technically, a petition at law, under the Code of Iowa, and claims damages for an alleged malicious prosecution, and for a false imprisonment. So far, then, from its being error in the court below to say, that "This suit is not necessarily to be considered an action for malicious prosecution, as known in our judicial tribunals prior to the Code, but is, in fact, for the recovery of such damages, if any, as plaintiff has sustained by the alleged wrongful acts of the defendants," it is a particularly happy

expression of just what the law is, as applicable to this petition. If the counsel will take another look at the petition, he will see, we think, that it is for damages, for: 1. Malicious prosecution; 2. False imprisonment; and 3. Expenses and losses incurred from Spring's wrongful conduct. We submit, then, that the view of the court below, of which appellant complains, is not only without error, but particularly proper and relevant.

As to the point, that a court has no right to modify instructions asked by counsel, we differ from the appellant. We think it is the duty of a court, where an instruction will mislead a jury, to so modify it, as that the jury shall apply, and not *mis*-apply, the law to the particular case. Now, in this case, the appellant, who was defendant below, was insisting on treating the plaintiff's case as though it were "an action for malicious prosecution," antecedent to the Code of Iowa. Was it not the duty of the court to so modify his instructions, as to expose to the jury this essential fallacy? The business of a court is to guide juries, not only to what the law is, as applied to particular facts, but also to warn them against what it is not. It is believed the court, in this case, has not erred against the rights of the appellant, in this behalf.

The next position of appellant is, that his fourth and fifth assignments of error are well taken, or that the issue was immaterial. It is a mistake to assume, as the appellant does in the argument, that there is, or was, but one issue, and that, as to whether or not there was advice of counsel. The real issue to the jury was, whether or not the appellant had probable cause for the prosecution he commenced against the appellee. The appellant now chooses to consider it as conceded on both sides, by the pleadings and at the trial, that if the party had advice of counsel, that then he had probable cause. This never was conceded. It is true, that the appellee demurred to a part of appellant's original answer to petition, on the ground that nothing that had been said or advised by third persons, other than counsel learned in the law, could have anything to do with

the case. The court sustained the demurrer, and thereupon the counsel seems to take it for granted, that the court, and the counsel who demurred, are committed to whatsoever their ingenuity may have deduced from such action of the court. The argument of the appellant seems to go upon the assumption, that advice of counsel is always probable cause. The authorities cited by appellant, do not sustain that position. We admit, that those authorities do sustain fully the position, that in an action for malicious prosecution (which we wish the court distinctly to remember, this is not), advice of counsel, on a full and fair statement of all the facts, is an important circumstance; in some of the cases, conclusive of the question of probable cause. But while this much is conceded, it is insisted that the action of the court below was correct, because the law, as applicable to this case, was, in the opinion of the court, contained in the eighth instruction of plaintiff, with which that of defendant was in seeming conflict. That instruction, the eighth asked by plaintiff, is copied literally from 2 Starkie on Evidence, 915, and is in these words: "The defendant may give in evidence, any facts which show that he had probable cause for prosecuting, and that he acted *bona fide*, upon that ground of suspicion." But, continues the author, "It is no answer to the action, that the defendant acted upon the opinion of counsel, if the statement of facts, upon which the opinion was founded, was incorrect, or the opinion itself unwarranted." Now, we do think, this instruction contains all the law of the case; and although we have searched diligently, we have not found any authority contradicting, or even in conflict with, it; on the contrary, we find it everywhere supported. In the same book, Starkie on Evidence, 913, note, it is quoted of Lord Mansfield, that in summing up a case to a jury, he holds this doctrine: "That it was not necessary to prove express malice, for if it appeared that there was no probable cause, that was sufficient to prove an implied malice, which was all that was necessary to be proved, to support this action."

Now, if what we have just cited be the law, how can it

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be said, that the court below erred in refusing the fourth instruction asked by defendant. But it is contended by appellant, that the court should have given his ninth instruction. We think not. If, under any circumstances, an instruction of that nature would be given, it ought only to be given, as thus modified: Instead of reading, "they will find for the defendant," it should read, "they will consider it in mitigation of damages." But how is this court to know the reason why the court below refused that instruction. It may have been refused, because the defendant offered no evidence on that question; because he failed to offer any evidence of the facts or statements which he made to counsel, upon which to get an opinion; or perhaps he failed to offer any proof, that he consulted counsel at all, or obtained any opinion from counsel. And the court will see by the record, that this portion of defendant's answer, is put in issue by plaintiff's replication. We say this may be the reason for refusing the instruction, and unless the contrary appears in the record, we believe it to be the rule and practice of this court, so to presume; that is, to presume that the instruction asked and refused, was irrelevant and immaterial. Counsel for appellant seems to proceed all through his argument, on two assumptions, both of which, we think, are false. First: That by demurring to his first answer, and alleging that the advice or suggestions of third persons learned in the law, could be urged as a defence, or even in excuse or mitigation; that we, therefore, admitted that the advice of counsel would be a complete defence to the action. Second: That it was simply necessary for him to allege in his answer, he had obtained advice of counsel, without making any attempt to prove it, although it is denied by plaintiff. Now, the first of these assumptions is far from correct; the second, is simply absurd. See the law from Starkie, as already quoted in the eighth instruction of plaintiff. It certainly is not the business of the court below, or the business of the appellee, to spread out on the record, the evidence, or the reasons for giving or refusing instructions to the jury. A naked proposition, although it may be in itself, abstractly

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considered, correct and good law; yet if it has no bearing on the particular case, or is entirely irrelevant, because there is no evidence before the jury on the point upon which it bears, it is just as properly refused by the court, we take it, as if it were wholly unsound as a legal proposition.

If, then, the appellant assigns for error, instructions given or refused by the court below, he must, in order to enable this court to decide on those errors, intelligently, embody, at least, all the evidence bearing on the particular point in his bill of exceptions. The principle here contended for, has been repeatedly recognized as the settled doctrine of this court, viz: that of all legal presumptions being in favor of the verdict and judgment below. *Dunham v. Benedict*, 1 G. Greene, 74; *Mackemer v. Bennér*, 1 G. Greene, 157; *Saum v. Jones County*, 1 G. Greene, 165; *Hampbell v. Salliday*, 1 G. Greene, 301. Indeed, this is the law everywhere. We are within the record, then, when we say, that the defendant offered no evidence in support of that allegation in his answer. If we are correct so far, it follows necessarily, that there is no error in refusing to arrest the judgment, or in overruling the motion for a new trial. The court below had all the evidence before it, and must have been competent to judge, whether the verdict was against evidence—the damages excessive—or that the jury were misled by the ruling of the court or its instructions. We are totally at a loss to comprehend, what the counsel for appellant means, when he talks of a “trick of the opposite party, if not of the court.” Certainly no trick was ever intended by the “opposite party,” and this court will scarcely believe, that the judge of the court below, could have “started out” with any reasonable hope of successfully playing tricks, on so ingenious a gentleman as our friend, the counsel for appellant.

WRIGHT, C. J.—The appellant claims that this is an action on the case for a malicious prosecution. This is denied by the appellee, he claiming that it is technically, neither an action for a malicious prosecution, nor for false imprisonment, but a petition under the Code, to recover damages for both.

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And this latter view appears to have been the one adopted by the court below; for, in addition to the modifications stated, it appears that the jury were told, that this "was not necessarily to be considered an action for malicious prosecution, as known under our judicial tribunals prior to the Code, but is in fact for the recovery of such damages, if any, as plaintiff has sustained by the alleged wrongful acts of the defendant." Under the Code, we need not give this action a technical name, any more than we would any other action that might be brought. But that it must be governed by those rules and principles which obtain in actions for malicious prosecution, we have no doubt. The plaintiff seeks to make defendant liable for having maliciously, and without probable cause, charged and prosecuted him for a felony. The imprisonment and expenses incident to such a prosecution, go to enhance the damages of plaintiff—and yet these could not be recovered in this action, if the prosecution was not malicious. *Turpin v. Renny*, 3 Blackf. 211; *Bodwell v. Osgood*, 3 Pickg. 379; *Morgan v. Hughes*, 2 Term, 225; *Winebiddle v. Porterfield*, 9 Barr. 137. In all actions for malicious prosecution, the plaintiff must not only show malice, and a want of probable cause, but also that he was in some manner damaged, either in person by imprisonment, in reputation, or in property, by expenses incurred. 3 Blackstone, 126, note 21; *Savil v. Roberts*, 1 Salk. 13. The two last, almost necessarily result in all cases; the first, may or may not exist. Whenever the prosecution is shown to be malicious, and without probable cause, the accused, if imprisoned on the charge, is of course, falsely so, so far as the prosecutor is concerned. But there could be no recovery for such imprisonment, without establishing that the prosecution was malicious, and without probable cause.

We are, therefore, unable to see why the court below, should have modified the defendant's instructions as asked; or why it should have hesitated to recognize the action as being in the nature of case for a malicious prosecution. All the pleadings and record, show conclusively, that this is the character of the action, and the defendant must be made lia-

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ble under the rules applicable thereto, or not at all. To not so treat it, we can well see, would reasonably tend to mislead the jury. When the defendant asked an instruction manifestly correct, as applied to this action, it was so modified by the court, as to be applied to an action for a malicious prosecution, and jurors, unacquainted with legal terms, might, therefore, well conclude that such was not the law, as applied to the case they were to determine. It was the duty of the court to determine the character of the action—by what rules and principles it was to be governed—and not leave it uncertain and confused, whether the law it was enunciating applied to the case at bar, or some other. And, therefore, in thus modifying these instructions, there was error.

The appellant further assigns for error, the giving, and refusing to give, the instructions contained in the statement of the case. The appellee insists, that as the evidence is not set out, this court cannot know, but that the defendant's instructions were properly refused, as not being applicable. We recognize the doctrine, that where correct instructions are refused, there should be sufficient to show their applicability, before such refusal will be held to be error. But in this case, we have the pleadings distinctly marking the issue to which these instructions point; the court gave an instruction, as asked by plaintiff, upon the same subject. Their refusal is not placed, or pretended to be, upon the ground of their inapplicability, and under such circumstances, we would not feel justified in treating them as foreign to the case. But aside from this view, the plaintiff procured an instruction, asserting the converse of the proposition contained in those of defendant's, which were refused; and if that given is incorrect, it will be just as fatal to the plaintiff, as to improperly refuse correct instructions. So that the question is fairly before us, whether the court erred in refusing and giving the instructions asked by the parties.

As to the first instruction, we think the language somewhat too general. To say that "if defendant acted under the advice of counsel, *malice* cannot be inferred from the want of *probable cause*," without qualification or limitation, is

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not correct. He may have misrepresented the facts; he may not have acted *bona fide*, under the counsel given, or he may himself have known or believed, that there was no cause for the prosecution; and if so, he would not be protected; and malice might be inferred from the want of probable cause, though he did act under the advice of counsel.

We then reach the only remaining question in the case—the one most discussed by counsel, and perhaps most important to the respective claims of the parties. If the defendant made a fair statement of all the facts in the case to counsel, and acted upon the advice given upon such statement, is he liable, if that opinion should be erroneous or unwarranted? Aside from authority, this court would not be united on this question. We have no doubt, however, but that the decided current of authorities, sustains the position assumed by appellant, and we shall so hold. Where a party lays all the facts before counsel, before beginning proceedings, and acts *bona fide*, upon the opinion given by such counsel, though that opinion is erroneous or unwarranted, he is not liable to this action. This is the general expression of the rule. If, however, the defendant misrepresents the facts to such counsel; if he does not act in good faith under the advice received; if he does not himself believe that there is cause for the prosecution or action; if counsel and client act in bad faith, in originating and urging the prosecution; he will not be protected, and in such cases the integrity or *bona fides* of his conduct, is a question of fact for the jury. *Snow v. Allen*, 1 Stark. 502; *Ravenga v. Macintosh*, 2 Barn. & Cres. 693; *Hall v. Suzdam*, 6 Barbour, 84; *Blunt v. Little*, 3 Mason, 102; *Stone v. Swift*, 4 Pick. 389; *Thompson v. Massey*, 3 Greenl. 305; *Williams v. Van Metre*, 8 Mo. 389; *Tanner v. Walker*, 3 Gill & John. 378; *Stevens v. Fasset*, 27 Maine, 207; *Wills v. Noyes*, 12 Pick. 324; *Hall v. Hawkins*, 5 Hemph. 357; *Sommer v. Will*, 4 Serg. & R. 19; *Wood v. Weire et al.*, 5 B. Mon. 544; 5 Greenl. Ev. § 459.

As this case must go back for retrial, we state briefly some of the general rules that should govern the decision of it, and like cases. To sustain this action, as already be-

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fore stated, plaintiff must show that the prosecution originated in the malice of the prosecutor, and without probable cause. To prove express malice even, is not sufficient, unless the want of probable cause is also shown. So that the want of probable cause cannot be inferred from express malice; but, on the other hand, malice may be implied from the want of probable cause. Numerous definitions have been given to the term "*probable cause*," as used in this action, but perhaps the clearest is to be found in *Weems v. Duport et al.*, 3 Wash. C. C. 31, where it is defined to be, a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to warrant a cautious man in the belief, that the person accused is guilty of the offence with which he is charged. See upon this subject, and the other rules above stated: *Davis v. Cook*, Nov. T. 1852; and also, *Johnson v. Sutton*, 1 Term, 493; *Taylor v. Williams*, 2 B. & A. 857; *Musgrove v. Newell*, 1 Mees. & Wels. 585; *Wilmarth v. Mountfort*, 4 Wash. C. C. 80; *Foshay v. Furguson*, 2 Denio, 617; *Ulmer v. Leland*, 1 Greenlf. 135; *Wills v. Noyes*, 12 Pickg. 324; *Adams v. Leshner*, 3 Blackf. 241; *Murray v. Long*, 1 Wend. 140; *Blunt v. Little*, 3 Mason, 112; *Turner v. Walker*, 3 Gill & Johns. 377; *Stone v. Stephens*, 12 Conn. 219; *Carrico v. Inednun*, 1 A. K. Marsh. 224; *Johnson v. Chambers*, 11 Iredell, 287; *Hall v. Suydam*, 6 Barb. 84; *Broad v. Horn*, 5 Bingham (N. C.), 722.

It is also well settled, that the question of probable cause, is a mixed one of fact and law, involving two distinct considerations, to be determined by two different tribunals. The sufficiency of the circumstances to constitute probable cause, is a question of law for the court; and the evidence of the circumstances, is for the determination of the jury. *Weems v. Duport et al.*, 3 Wash. C. C. 31. Malice is, in all cases, a question of fact for the jury, and may be either express or implied. *Mitchell v. Jenkins*, 5 Barn. & Adol. 588, *Newell v. Downs*, 8 Blackf. 523.

Judgment reversed.

McConnoughey v. Weider.

McCONNUGHEY v. WEIDER.

A replication under oath, to an answer calling for such sworn replication, need not contain more than a reference to the specific allegations contained in the answer.

By sections 1744, 1745, and 1746, of the Code, the replication may be required to be under oath, but in all other respects, it need not differ from that provided for in the sections immediately preceding.

If such pleading is evasive, or fails to deny, or respond to, the allegations contained in the pleading to which it professes to respond, the same consequences follow that are contemplated by section 1742.

Sections 1744, 1745, and 1746 of the Code, were not designed to enable a party in an action at law, to obtain a discovery of any and all matters of defence, whether of an equitable or legal character, which he might see proper to set up or plead.

Whatever might be tried at law, the defendant may make an issue upon, and require a disclosure under oath from his adversary; but he cannot in this method, engraft upon an answer in an action at law, matters that are alone cognizable on the equity side of the court.

Where in an action for money had and received, the defendant answered, admitting the receipt of the money, but averred that he inclosed the same in a letter, and deposited it in the proper post-office, to plaintiff's address, at his request, and that plaintiff had received the same by due course of mail, which answer was sworn to, and called for a reply under oath; and where the plaintiff replied under oath, negating the new matter set up in the answer; and where the defendant moved to strike the replication from the files, for the reason that it was not sworn to according to law, and as required by the answer, but the motion did not specify wherein it was not properly sworn to, which motion was overruled by the court; and where the cause was submitted to the court, on the petition, sworn answer, and sworn replication, without any testimony, and the court rendered judgment for the plaintiff; *Held*, 1. That the replication was sufficient, 2. That the motion to strike from the files, was properly overruled; and 3. That the court did not err in rendering judgment for the plaintiff on the pleadings.

Appeal from the Des Moines District Court.

PETITION to recover money had and received by defendant, for plaintiff's use. Defendant answers, admitting the receipt of the money, but averring that he inclosed the same in a letter, and deposited it in the proper post-office, to plaintiff's address, at his request, and that plaintiff had received

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the same by due course of mail. This answer is sworn to, and requires the reply thereto to be given under oath. The plaintiff accordingly replies under oath, negating all the allegations of the answer. Defendant moved to strike this replication from the files, because it was not sworn to according to law, and as required by the answer. This motion was overruled, and the cause being submitted to the court on the pleadings, judgment was rendered for plaintiff, and defendant appeals.

J. C. Hall, for the appellant.

Browning & Tracy, for the appellee.

WRIGHT, C. J.—The appellant claims that the court erred in overruling his motion, and in rendering judgment on the pleadings, for plaintiff. No objection has been pointed out to the manner in which the replication was sworn to, and we are unable to see any such substantial defect, as would justify striking the same from the files. In the ruling on this motion, therefore, we think the court below did not err.

The objection principally relied upon, however, is, that the replication merely negatives the allegations in the answer, and makes no discovery of the circumstances attending the mailing and receipt of the money. And in the first place, we may say, that if the replication is true, then the money never was mailed or received, and there remains nothing to disclose—there was no discovery to be made. Neither do we understand, that under the Code, the replication need in such cases, contain more than a reference to the specific allegations contained in the answer. By sections 1744, 5 and 6, the pleading may be required to be under oath, but in all other respects, it need not differ from that provided for in the sections immediately preceding. If such pleading is evasive, or fails to deny or respond to the allegations contained in the pleading to which it professes to respond, the same consequences follow that are contemplated



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by section 1742. When under the oath of the party himself, it becomes evidence of equal weight with that of a disinterested witness. These sections of the Code, in our opinion, were not designed to enable a party in an action at law, to obtain a discovery of any and all matter of defence which he might see proper to set up or plead, whether of an equitable or legal character. Whatever might be tried at law, he may make an issue upon, and require a disclosure under oath, from his adversary. He cannot, however, in this method, engraft upon an answer in an action at law, matters that are cognizable on the equity side of the court. And we may say further, that the Code contemplates succinctness and perspicuity in all pleadings, whether sworn to or not, and never was designed to permit that method of pleading found in many records—the chief recommendation of which consists in its superabundance and unnecessary length. A pleading under the Code, should be as much a logical statement of the plaintiff's cause of action, or the defendant's ground of defence, as was ever required by the strict rules of the common law—the cause of action or defence, being made clear and palpable, and not concealed, either by terms and expressions too general, or by a too copious use of language.

In this case, we think, the replication properly responds to the allegations contained in the answer. It specifically denies all the new matter, by which defendant seeks to avoid his liability, and we are unable to see how it could more nearly comply with the intention of the Code in reference to such pleadings. We also think that the court below was clearly right, in rendering judgment for the plaintiff on the pleadings—neither party offering any proof.

Judgment affirmed.

BRINK v. MORTON *et al.*

Where in a suit in chancery to enforce the specific performance of a contract to convey real estate, one of the respondents filed an answer not under oath, to which a replication was filed, and the cause was then continued; and where at a subsequent term, and after depositions had been taken, the respondent was permitted, against the objection of the complainant, to file an amended and sworn answer; *Held*, That the court did not err in allowing the answer to be filed.

The legislature possessed the power to amend the practice in relation to pleadings in chancery, so that amendments may be permitted, which had not before been allowed.

Sections 1756 to 1759 of the Code, inclusive, apply to proceedings in equity, as well as at law.

Where the condition in a bond for the conveyance of real estate, read as follows: "Whereas the above-named B. pays to the above M., two promissory notes—one fifty dollar note, payable on demand, at ten per cent. interest; the other payable in one year from date, two hundred dollars, at the rate of ten per cent. Whereas, if B. pays the above sum to the above M., at the expiration of the year, then the above-named M. does deliver unto the above-named B., at the expiration of the year, August 8th, 1854, a deed, with general warranty [here follows a description of the land]; then this obligation to be null and void—otherwise to remain in full force and virtue in law;" *Held*, That time was not of the essence of the contract.

Where in a suit to enforce the specific performance of a contract to convey real estate, against the vendor and a subsequent purchaser, with notice of the rights of the original vendee, it appeared from the testimony, that the vendor had placed the original vendee in possession of the premises; that the said vendee had paid part of the purchase money, which the vendor still retained, and had made improvements on the land; that the notes for the unpaid portion of the purchase money, bore the highest rate of interest; that the land had enhanced in price; that the balance of the purchase money was brought into court; that the vendor had never put an end to the contract, by refunding the money paid, giving up the note for the balance due, and making, or offering to make, reasonable compensation for the improvements made; and that the subsequent purchaser from the vendor, had notice of the rights of the complainant; and where the suit to enforce the performance of the contract, was commenced in about three months after the last payment became due; *Held*, That the contract should be specifically performed.

Where in such a case, the defendant alleged that the contract sought to be enforced, had been obtained by the fraudulent representations of the complainant, setting out the alleged representations; and where the respondent requested a jury to try the issues of fact raised by the pleadings, and a jury

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was thereupon called, and issues submitted to them, among which was the following: "Did the complainant procure the execution of said bond by means of false and fraudulent inducements held out by him to the respondent?" to which the complainant objected; and where the jury found the said issue in favor of the respondent; *Held*, That the issue presented to the jury, was broader than that made by the pleadings, and was erroneous.

Although a defendant may answer, setting up fraud generally, yet if he alleges a particular state of fraud only, he will be confined in his evidence, to proof of the fraud alleged; and the issue submitted to the jury, must not enlarge the pleadings.

And where in such a case, upon an issue of fraud in procuring the execution of a contract, the jury found for the respondent, and the court thereupon dismissed the bill of the complainant; and where the evidence submitted, did not support the finding, the Supreme Court reversed the decree, and refused to submit the issue to a jury a second time, but instructed the court below to render a decree in favor of the complainant.

Appeal from the Jones District Court.

THIS was a bill filed to enforce the specific performance of a contract to convey land, contained in a title bond, dated August 8th, 1853, containing the following condition: "That whereas the above Austin Brink pays to the above Ezra Morton two promissory notes, one fifty dollar note, payable on demand, at ten per cent. interest; the other payable in one year from date, two hundred dollars, at the rate of ten per cent.; whereas if Elijah Austin Brink pays the above sum to the above Ezra Morton, at the expiration of the year, August the 8th, 1854, a deed with general warranty, conveying to him so much of (here follows a description of the land), then, this obligation to be null and void, otherwise to be and remain in full force."

The petition states, that defendant executed this bond; that petitioner executed and delivered to the defendant the two notes named therein; that defendant gave to petitioner possession of the premises; that petitioner erected a house on said land; that he had the assistance of Morton in so doing; that his sister lived in it during a part of the past winter, and that when she left it, petitioner leased it to another person; that there was on a part of the land purchased, a house and about three acres broken, which pe-

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petitioner inclosed; that petitioner leased this house and the land under cultivation, and his tenant had raised a crop on shares on it, a part of which is not yet harvested; that petitioner paid the note on demand, and went to Pennsylvania last fall, intending to remove his family in the spring, but in March last was taken sick, and remained sick a long time, and was prevented from reaching Cedar county, until the latter part of September, 1854; that at the time of the purchase, petitioner informed defendant Morton, that he expected to commence merchandising, and desired to know, that if he wanted the time extended on the last note six months, whether the defendant would do it, and defendant informed petitioner that he would; that about July last, petitioner being still detained in Pennsylvania, by sickness, wrote to Ephraim Brink, and requested him to call on Morton, and inform him, that if he must have the money on the day when the note fell due, it should be paid, but soliciting an extension of the time, in consequence of his detention in Pennsylvania; and petitioner charges that in July, 1854, before the said note for two hundred dollars became due (petitioner having paid the fifty dollar note), the father of petitioner went to said Morton, at the request of petitioner, and requested an extension of time on said note, and informed him, that if the money must be paid, that it should be ready when the note fell due, and that defendant thereupon informed the father of petitioner, that he had agreed at the time the note was given, to extend the time for payment six months, and that he would extend it six months; that if he should conclude to go east during the summer, he might want a hundred dollars; Ephraim told him he should have it, but defendant neither went east, nor called for the one hundred dollars; that defendant, in violation of his contract, without tendering to petitioner the money paid and the note; and without tendering him a deed, on the 8th of August, 1854, and before the days of grace on the note had expired, made a contract for the sale of said tracts of land, so sold to petitioner, to one Charles Williams, for the sum of four hundred and fifty dollars, and some time afterwards,

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about the 20th of August, gave a deed therefor to said Williams. The petition further states, that said Williams had actual notice that petitioner had made a contract with Morton for the purchase of said land, and that petitioner's possession of said land, was open and notorious in the neighborhood. And that soon after petitioner reached the county of Cedar, in September, 1854, he informed Morton that he was ready to pay him the balance of the purchase money; and on the 25th of October, 1854, petitioner made him a tender of the balance due on the said land, in specie, and the defendant refused to comply with the contract on his part. The petition charges that defendants hold the land in trust for petitioner, and prays that they may be decreed to specifically execute the trust; and alleges the bringing of the money into court, and offers to perform the contract, &c.

This petition was filed on the 4th of November, 1854. On the 9th of May, 1855, an answer was filed by each of defendants, and on the same date, a replication to said answers. Neither of these answers was upon oath. At the September term of the court, in 1855, the defendant Morton was permitted to file an amended answer, on oath. The answer of Williams denies notice; admits the purchase, and the receipt of a deed, on the 6th of September, 1854, by which he holds. In the amended answer, Morton admits the execution of the bond; avers that the inducement which led him to the execution of the bond, was the express agreement of the plaintiff, to establish on said land a store, for the accommodation of defendant and the neighborhood; that said inducement was falsely and fraudulently held out to him by the plaintiff, in order to get him to execute said bond, the plaintiff not intending at the time to establish a store on said land. It also admits that plaintiff soon after the execution of the bond, went to Pennsylvania, and did not return until September, 1854; that he knows nothing of defendant's sickness, and requires proof thereof; that at the time of the execution of the bond, the plaintiff informed him that he expected to commence merchandising, but denies that de-

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defendant informed plaintiff, that he would extend the time on the last note, as stated in petition, but admits that he did say to plaintiff, that in case he should find himself cramped for money in his business of merchandising, in consequence of selling goods on credit, from his contemplated store, then and in that case, this defendant promised the plaintiff, that he would wait for awhile beyond the specified time, for a portion of the money, namely, for one hundred dollars, and no more, and that only on the above condition; denies that he informed Ephraim Brink, in July, 1854, that he had agreed to extend the time for the payment of said note six months, at the time said note was given, or that he agreed to extend the payment of said note six months; but avers the truth to be, that within a few days of the time when said note fell due, the said Ephraim called on the defendant, and said he had not heard from the plaintiff for some time, and wanted to know of defendant, if he wanted his money, to which defendant replied, he did, and must have one hundred dollars, and interest on the whole, at all events; and defendant denies that this was conditioned on his going east as stated; and denies that in September, 1854, plaintiff informed him that he was ready to pay the balance as stated, but on the contrary, insisted that it was, and had been, paid. The answer further denies, that any tender was made to him, as stated in said petition, or any other tender, and that plaintiff has been ready and willing to comply with said contract on his part.

To the amended answer, no replication appears to have been set up, but to the answers as they originally stood, before the amendment of Morton's, there is a general replication, accompanied by an agreement of counsel, that the same shall be taken as specific denials of the allegations of the answers. But both parties have, in this court, treated the answers as though replied to. To try the issues of fact raised by these pleadings, the defendant requested a jury. A jury was called. On the part of the plaintiff, the court was requested to submit the following issues:

1st. Did the plaintiff, Elijah A. Brink, and Ezra Morton,

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make the contract named in the petition, dated on the 8th day of August, 1853?

2d. Did Brink, the plaintiff, pay the first fifty dollars required to be paid by the contract?

3d. Did the defendant agree with the plaintiff, or his agent, to waive the payment of the \$200, at the precise time when it fell due?

4th. If no agreement was made to extend the time of payment, was the plaintiff detained from Iowa in Pennsylvania, by sickness, and did he return to Iowa, in September following; and did he in September, soon after his return, offer to pay to the defendant Morton, the amount of the note and interest, and demand a deed?

5th. Did Charles Williams, at the time he purchased the land of Morton, know that Morton had made a contract with the plaintiff for the sale of the land in dispute, and that the plaintiff had paid a part of the purchase money?

6th. Did the plaintiff offer to the defendant, to pay him the note due for the land, in the month of October, 1854?

The defendant submitted the following:

1st. Whether the plaintiff has satisfied them, the jury, that the defendant agreed to extend the time of payment for six months, or any other time, on the note of \$200?

2d. Did the plaintiff ever unconditionally tender to the defendant, the amount of said note of \$200, and interest? If so, when was this tender made?

3d. Did the defendant Charles Williams, purchase said land in good faith, for a valuable consideration, without notice that the plaintiff had any legal claim for and upon said land?

4th. Did the plaintiff procure the execution of said bond, by means of false and fraudulent inducements, held out by him to the defendant? To the issues submitted by defendants, the plaintiff excepted, as not being proper issues, but the exception was overruled by the court.

A great number of instructions were given to the jury, at the instance of the parties, but as they are not material to the decision of the court, they are here omitted. The jury re-

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turned a verdict, finding all the issues submitted by the complainant, except numbers one, two, and five, for the defendant, and these were found for the plaintiff. On the issues submitted by the defendants, and to which the complainant objected, the finding of the jury was for the respondents. The complainant then filed a motion to set aside the verdict, and for a new trial, which was overruled, and a decree rendered dismissing the bill, at the cost of the complainant, from which he appeals. The evidence in the case, is sufficiently stated in the opinion of the court.

Whitaker & Grant, for the appellant.

Cook & Dillon, for the appellees.

ISELL, J.—This case, as presented to the court, raises a multitude of questions, upon the discussion of which, unless absolutely necessary, we do not choose to enter in detail. We are constrained to the conclusion, that in the zeal manifested by counsel in the discussion of minor questions, the more important have been measurably overlooked, or lost sight of. The first point made by counsel, demands our attention, as lying in the way of arriving at the merits of the case. It is insisted, that the court erred in permitting the defendant Morton, to file an amended and sworn answer. We think the defendant's counsel have fully and properly met this objection. The Code, from section 1756 to 1759, inclusive, evidently shows the intention of the legislature to be, that a very liberal policy with regard to amendments should be adopted. By the latter clause of section 1758, amendments shall be allowed in any stage of the proceedings, upon such terms as the court deems just. In the case before us, the objection is not, that unjust terms were prescribed for the amendment, but that the amendment was allowed on any terms. The question is not now as to the effect of the amended answer as evidence, but as to the power of the court to allow it. Of the power of the legislature to amend the practice in relation to pleadings in chancery, so

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that amendments may be permitted, which had not before been, we have no doubt. And that the framers of the Code, and the legislature which adopted it, intended the provisions of these sections to apply to proceedings in equity, as well as at law, if they did not actually intend to reduce the pleadings in both to one common system, there can be little question. We hold, therefore, that it was within the discretion of the court to permit the amendment.

We propose to pass over, for the present, the several other points made by the plaintiff, and inquire as to the last point, namely, whether the court should have entered a decree for the plaintiff, *non obstante veredicto*. The first question which arises in this inquiry, is, was time of the essence of the contract, which is at the foundation of this suit. The condition of the bond, is very inartistically drawn. It recites that, "whereas the above-named Austin Brink pays to the above Ezra Morton, two promissory notes, one fifty dollar note, payable on demand, at ten per cent. interest; the other payable in one year from date, two hundred dollars, at the rate of ten per cent. Whereas, if Elijah Austin Brink pays the above sum to the above Ezra Morton, at the expiration of the year, then the above-named Ezra Morton does deliver unto the above-named Elijah Austin Brink, at the expiration of the year, August the 8th, 1854, a deed with general warranty (here follows a description of the land, and the bond concludes), then this obligation to be null and void, otherwise to remain in full force and virtue in law." We understand the intent of the parties, by this condition, to be that Morton should bind himself to convey at the expiration of a year, provided the purchase money was paid. The notes were running at the highest rate of interest known to the law. The security was in the hands of the obligor, and although one of the notes was liable to be demanded at any time, either by suit or otherwise, the obligor did not even take the precaution, to make the condition of the bond to depend upon the several sums being paid, as they should respectively fall due; and it is admitted by the answer, that, up to within a few days of the time the two hundred dollar

note fell due, defendant (Morton) insisted upon payment of part of the amount, and interest on the whole, when the note fell due, showing that he then relied upon his money and interest, and not upon any forfeiture. We see nothing to justify the conclusion, that at the time of the execution of the bond, the parties regarded time as of the essence of the contract. The execution of the bond—the payment of the fifty dollar note—the fact that plaintiff entered into possession, and made improvements—and that defendant Morton, “without tendering to petitioner the money paid, and the note or a deed, on the 8th of August, 1854, before the days of grace had expired on the note,” sold to defendant Williams—are facts charged in the petition, and not denied in the amended answer of Morton; and the latter fact is not denied in the answer of defendant Williams. That the land had risen in value, either by the improvements of plaintiff, or from other cause, is apparent from the price admitted to have been paid by Williams. That defendant Williams, at the time he purchased the land of Morton, knew that Morton had made a contract with the plaintiff for the sale of the land in dispute, and that the plaintiff had paid part of the purchase money, is found by the jury, in response to the fifth issue presented by plaintiff, although in response to the third issue of defendant, the jury find that Williams purchased the land in good faith, for a valuable consideration, without notice that the plaintiff had any legal claim for, or upon, the land.

At first view, these findings would appear contradictory, and they are, in fact, so, except in one view, of which we shall speak hereafter, namely: that although Williams knew of the contract, yet, inasmuch as the jury believed it void for fraud, it was not a legal claim for or upon the land. We grant the proposition contended for by defendants, that an application to enforce a specific performance, is addressed to the sound discretion of the court; and admitting, for the present, that this bond was not void on account of fraudulent representations or inducements to procure its execution, and admitting all the other issues which are found for the defendants, and we can but conclude, that there is a strong

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A replication under oath, to an answer calling for such sworn replication, need not contain more than a reference to the specific allegations contained in the answer.

By sections 1744, 1745, and 1746, of the Code, the replication may be required to be under oath, but in all other respects, it need not differ from that provided for in the sections immediately preceding.

If such pleading is evasive, or fails to deny, or respond to, the allegations contained in the pleading to which it professes to respond, the same consequences follow that are contemplated by section 1742.

Sections 1744, 1745, and 1746 of the Code, were not designed to enable a party in an action at law, to obtain a discovery of any and all matters of defence, whether of an equitable or legal character, which he might see proper to set up or plead.

Whatever might be tried at law, the defendant may make an issue upon, and require a disclosure under oath from his adversary; but he cannot in this method, engraft upon an answer in an action at law, matters that are alone cognizable on the equity side of the court.

Where in an action for money had and received, the defendant answered, admitting the receipt of the money, but averred that he inclosed the same in a letter, and deposited it in the proper post-office, to plaintiff's address, at his request, and that plaintiff had received the same by due course of mail, which answer was sworn to, and called for a reply under oath; and where the plaintiff replied under oath, negating the new matter set up in the answer; and where the defendant moved to strike the replication from the files, for the reason that it was not sworn to according to law, and as required by the answer, but the motion did not specify wherein it was not properly sworn to, which motion was overruled by the court; and where the cause was submitted to the court, on the petition, sworn answer, and sworn replication, without any testimony, and the court rendered judgment for the plaintiff; *Held*, 1. That the replication was sufficient, 2. That the motion to strike from the files, was properly overruled; and 3. That the court did not err in rendering judgment for the plaintiff on the pleadings.

Appeal from the Des Moines District Court.

PETITION to recover money had and received by defendant, for plaintiff's use. Defendant answers, admitting the receipt of the money, but averring that he inclosed the same in a letter, and deposited it in the proper post-office, to plaintiff's address, at his request, and that plaintiff had received

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the same by due course of mail. This answer is sworn to, and requires the reply thereto to be given under oath. The plaintiff accordingly replies under oath, negating all the allegations of the answer. Defendant moved to strike this replication from the files, because it was not sworn to according to law, and as required by the answer. This motion was overruled, and the cause being submitted to the court on the pleadings, judgment was rendered for plaintiff, and defendant appeals.

J. C. Hall, for the appellant.

Browning & Tracy, for the appellee.

WRIGHT, C. J.—The appellant claims that the court erred in overruling his motion, and in rendering judgment on the pleadings, for plaintiff. No objection has been pointed out to the manner in which the replication was sworn to, and we are unable to see any such substantial defect, as would justify striking the same from the files. In the ruling on this motion, therefore, we think the court below did not err.

The objection principally relied upon, however, is, that the replication merely negatives the allegations in the answer, and makes no discovery of the circumstances attending the mailing and receipt of the money. And in the first place, we may say, that if the replication is true, then the money never was mailed or received, and there remains nothing to disclose—there was no discovery to be made. Neither do we understand, that under the Code, the replication need in such cases, contain more than a reference to the specific allegations contained in the answer. By sections 1744, 5 and 6, the pleading may be required to be under oath, but in all other respects, it need not differ from that provided for in the sections immediately preceding. If such pleading is evasive, or fails to deny or respond to the allegations contained in the pleading to which it professes to respond, the same consequences follow that are contemplated



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versy? If this issue is found in the affirmative; then, secondly, was this agreement made without the intention on the part of the plaintiff, at the time, to establish such store? If this issue is found in the affirmative; then, thirdly, was plaintiff induced by said agreement, to execute said bond?

It is readily obvious that the issue presented to the jury, was much broader than that made by the pleadings. The pleadings are made to apply to a particular case of fraud, while that presented by the court, may apply to any fraud. It is no answer to the objection urged to this issue, that fraud may be plead generally, and if any existed in the procuring the execution of the bond, that it ought not to be enforced; for, in the first place, although a defendant may answer as to fraud generally, yet if he states a particular state of fraud only, he will be confined in his evidence to that; and the issues may not enlarge the pleading; and, secondly, the plaintiff should only be required to come with proof to make his case good, as it stood upon the face of the pleadings. The evidence in chancery causes is generally, as in this case, by depositions, and it would work a great surprise, if a party were allowed to come up on the hearing, with issues more enlarged or different than those in the pleadings, in relation to which the evidence had been taken. The issues, properly speaking, are the facts alleged in the pleadings on the one side, and denied, in like manner, on the other. The fourth issue presented by defendant, and sustained by the court, not arising upon the pleadings, to the extent submitted to the jury, a question arises, admitting that if no other difficulty presented itself, would it be proper in such state of case as is here presented, to enter a decree *non obstante*? The jury have found that the plaintiff procured the execution of the bond sought to be enforced specifically, by false and fraudulent inducements held out by him to defendant. In the face of this finding, although more general than the charge in the answer, it would appear against conscience to enforce the performance. But it would rather seem the duty of the court, to set aside the verdict in this particular, and remand the cause, that the proper issues

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raised by the pleadings, might be passed upon by a jury. But, on a careful examination of the testimony, as to the issues of fraud made by the answer and replication, we conclude, that to remand the cause for the hearing of these issues by a jury, is not demanded at our hands, for the reason that there is not the shadow of testimony to sustain the charge, that plaintiff agreed to establish a store on the premises in controversy. This was new matter alleged by defendant Morton, and which it was incumbent upon him to prove. The only allusion to such agreement, that we are able to find anywhere in the testimony, is a statement of Morton himself, in a conversation with the father of plaintiff, testified to by Silas Ballow, in which Morton said "that he was disappointed in E. A. Brink; that he had sold the place, with the expectation of having a store go up there, to make a business place there." This being the state of the evidence, as to the main proposition contained in the issues relating to fraud, we conclude, that if Williams had notice of the contract, there was no such fraud shown as to justify him in purchasing, upon the ground that the contract was void; and that it is unnecessary to resubmit the issues to a jury. The decree of the District Court will, therefore, be set aside, and a *procedendo* issue, requiring a decree in accordance with this opinion.

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Where on the third of March, 1852, G. and wife executed a mortgage to one L., on the west third of lots 10, 11, and 12, in block 30, in the city of Keokuk, to secure the payment of \$350.00, which was recorded April 21, 1852; and where, on the 17th of May, 1852, G. sold to C. and G. the same part of lot 10, the deed for which was recorded December 30, 1852, and in January, 1853, G. sold the same portions of lots 11 and 12 to B., whose deed was recorded April 5, 1853; and where the mortgage was sold by L. to one F., and by F. to C. & G., who in August, 1853, commenced suit against G. and wife, to foreclose said mortgage on lots 11 and 12, without making B. a

2	423
79	388
2	423
90	456

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party, in which suit a decree of foreclosure was rendered for \$383.07, which amount included, by agreement with the agent of G., the sum of \$54.36, for interest paid on money borrowed to purchase said mortgage, and attorney's fees for foreclosing the same; and where B., pending the proceedings, appeared by his attorney, and filed a paper in the cause, stating the respective purchases of himself and complainants, and asking that the lots purchased by him, be held liable to pay two-thirds only of said debt, and that the lot purchased by C. and G. should be liable for the remaining third, of which paper no notice was taken in the adjudication of the cause; and where, by virtue of the decree of foreclosure, the lots were sold by the sheriff, under a writ without the seal of the court, and purchased by R. for the amount of the decree and costs, who received a sheriff's deed therefor; and where B. then filed his bill, setting forth the foregoing facts, alleging that the decree of foreclosure was obtained by fraud, and in prejudice of his rights, and praying that the decree, as well as the sale to R., might be set aside, that R. might be enjoined from taking possession, or receiving the rents, under his pretended purchase, and the mortgage released, upon B. paying two-thirds of the mortgage debt; upon the hearing of which bill, the court found that B. purchased the property owned by him of G., without notice of the purchase of C. and G., and that the property of B., so purchased, was three times as valuable as that purchased by C. and G., and thereupon the court decreed, that the decree of foreclosure, and the sheriff's sale and deed to R. be set aside, so far as the said B. was affected—that B. and C. and G. should contribute to the satisfaction of the mortgage, in proportion to the value of the lots purchased by each—that R., the purchaser at the sheriff's sale, should recover three-fourths of the amount of his bid of B., the complainant, and one-fourth of C. and G., with six per cent. interest from the date thereof—that the incumbrance created by said mortgage be extinguished—that the decree of foreclosure stand as a judgment against G.—that C. and G. should assign three-fourths thereof to B.—and that each of the contesting parties pay one-third of the costs:

- Held*, 1. That as B. would have a right before foreclosure of the mortgage, to bring a bill to redeem the premises from the incumbrance, and determine the amount, so he may, if not made a party to the suit to foreclose, file a like bill, to correct any mistake made in a decree which injuriously affects his rights.
2. That as B. was not made a party to the suit for foreclosure, in the first instance, nor by any subsequent order of the court, and inasmuch as the mortgage suit was determined without any reference to the paper filed by him in said cause, and his right to appear in such suit was neither recognized nor admitted, that B. did not make such an appearance in the mortgage suit, as that he is concluded by the decree in that case, and precluded from filing a bill to correct mistakes in that decree.
3. That B. was only bound to pay his proportion of what was actually owing on the mortgage; and that while the holder of the mortgage and the mortgagor might include the sum of \$54.36, for interest paid for money borrowed to purchase the same, and attorney's fees, yet it was manifestly improper to

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require B. to pay any part thereof, before he could hold his property divested of the mortgage lien.

4. That B. having purchased with notice of the mortgage, the mortgagee, by virtue of his prior lien, had the right to subject the property to the payment of his debt; but he had no right to subject it to the payment of any sum that the mortgagor might consent to include in the decree.
5. That B. should be required to pay his portion of the costs, in the foreclosure case, up to the time of rendering the decree, but that the costs subsequent to the decree he should not pay.
6. That the decree of the court below, so far as it charged the property purchased with the payment of the mortgage debt, in proportion to the respective value of each parcel, was correct, and that B. was properly required to pay three-fourths of the mortgage debt.

The value of land mortgaged, is what is presumed to have governed the mortgagee in taking his mortgage; and, by this value, should the respective liabilities of the subsequent purchasers be measured.

Where a portion of the mortgaged premises are subsequently sold, the mortgagor retaining the remaining part, the portion unsold should, in equity, first be subjected to the payment of the mortgage debt.

While the mortgage covers, and is a lien on, all the estate alike, yet the mortgagor, in addition to his legal obligation, arising as well from the mortgage, as his covenants in his deed to the subsequent grantee, is morally bound to pay the debt, and divest that which he has sold, of any incumbrance.

In like manner, on his death, the heir occupies his place, and, sitting in the seat of the ancestor or original grantor, is bound to discharge the debt, to the extent of the assets descending.

As between two grantees, however, purchasing different parcels of the incumbered premises, at different times, there is no more moral obligation on the one to pay, than the other; and in such cases, their interest is common—their rights are equal—and there should be equality of burden.

The junior, as well as the senior, purchaser of mortgaged premises, makes an absolute purchase; each pay a full consideration, and have a like reason to suppose that the mortgage debt will be paid, and their estates held alike divested of the incumbrance.

While each has purchased absolutely, yet, if the mortgage should not be discharged, they acquire no more than the right to redeem the parcel held by each; and neither should complain, if, by the decree which settles their respective rights, he is secured the equity thus acquired, upon equal terms.

Appeal from the Lee District Court.

On the third of March, 1852, Gage and wife executed a mortgage to one Littler, on the west third of lots 10, 11, and 12, in block 80, in the city of Keokuk, to secure the sum of three hundred and fifty dollars. This mortgage was

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recorded April 21, 1852. On the 17th day of May, 1852, Gage sold to the defendants, Coffindaffer and Griffey, the same part of lot 10, which was recorded, December 30, 1852, and in January, 1853, he sold the same portions of lots 11 and 12, to Bates, the complainant, whose deed was recorded April 5th, 1853. The mortgage was afterwards sold by Littler to one Ford, and by Ford to Coffindaffer and Griffey. In August, 1853, they commenced suit to foreclose said mortgage on lots 11 and 12, against said Gage and wife. On the hearing of this case, it appears that there was found due on the mortgage, the sum of \$383.09, which amount, by agreement with the agent of Gage, included the sum of \$54.36, for interest paid on money borrowed to purchase said mortgage, and attorney's fees in foreclosing the same. Bates was not made a party, but pending the proceedings, he appeared by his attorney, and filed a paper in the cause, stating the respective purchases of himself and respondents, and asking that the lots purchased by him, be held liable to pay two-thirds only of said debt, and that the lot purchased by Coffindaffer and Griffey, should be liable for the remaining third. The decree having foreclosed the mortgage as to the lots owned by Bates, an order of sale was issued, and the lots sold to Ruddick, for the sum of \$418, being the amount of the decree, interest, and all costs. This order was not, however, under the seal of the court, from which it issued, nor did it have any seal. The sheriff having made a deed to Ruddick, in pursuance of said sale, complainant filed the bill in this case, setting forth most of the foregoing circumstances, alleging, also, that the decree of foreclosure was obtained by fraud, and in prejudice of his rights, and praying that the same, as well as the sale to Ruddick, might be set aside; that Ruddick might be enjoined from taking possession or receiving the rents under his pretended purchase; and the said mortgage released and canceled, upon complainant's paying two-thirds of the mortgage debt. The bill was answered by the defendants, issue joined thereon, and the cause heard on depositions, exhibits, and pleadings. On the final hearing, the court decreed, that the said judgment of

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foreclosure, as also the sheriff's sale and deed to Ruddick, be set aside, so far as the said Bates was concerned. It was also found, that the said complainant purchased the property owned by him, of Gage, without notice, actual or constructive, of the purchase by Coffindaffer and Griffey, and that they should, therefore, contribute in proportion to the value of their purchase, to the satisfaction of said mortgage. It also appears, that the court found that complainant's property, so purchased, was three times as valuable as that purchased by Coffindaffer and Griffey, and that they should contribute to satisfy said mortgage in that proportion. And it was, therefore, decreed that Ruddick recover three-fourths of the amount of his bid of complainant, and one-fourth of Coffindaffer and Griffey, with six per cent. interest from the date thereof; that the incumbrance created by said mortgage, be extinguished; that the said decree of foreclosure stand as a judgment against Gage; that Coffindaffer and Griffey should assign three-fourths thereof to complainants, and that each of the contesting parties pay one-third of the costs. From this decree, complainant appeals.

Miller & Beck, for the appellant.

S. F. Miller, for Ruddick.

Marshall & Moss, for the other defendants.

WRIGHT, C. J.—In determining this case, we shall confine ourselves to the objections urged to the decree rendered by the court below. And in the first place, complainant claims that the decree foreclosing the mortgage, the sheriff's sale, and the deed made thereon, are void as to him. It is conceded by defendants, that the sale and deed convey no title, and were properly set aside, from the fact that the execution under which the sheriff acted, had no seal.

The only question in this part of the case, then, relates to the validity of the decree of foreclosure against complainant. No objection was made by defendants below, or here, to the

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right of the complainant to bring this bill, or to its character. We have, then, before us, what we regard as an application, by a party interested in the property, to redeem the same from a lien created by a prior mortgage. And without determining whether it was, or was not, necessary to make him a party to the proceeding to foreclose such mortgage, we think, that as he would have a right, before foreclosure, to bring such bill, in order to determine the amount of the incumbrance, so he may, if not made a party, file a like bill, to correct any mistake made in a decree which injuriously affects his rights. The defendants insist, however, that complainant is concluded by that decree, from the fact that he made an appearance, when he filed the paper referred to in the statement of the case. In this view, we cannot concur. ✓ He was not a party in the first instance, nor by any subsequent order of the court. The case, indeed, appears to have been determined without any reference to this paper. If the party foreclosing the mortgage, had made him a party in his petition, prayed process against him, or sought to bring him in by notice, it would have been different. Here, however, instead of being in court, or so regarded, his right to appear, was not recognized or admitted.

Then, was there any such mistake in this decree of foreclosure, as should have been corrected? We think there was. Granting that complainant was only bound to contribute his proper proportion, and not to pay the whole of the mortgage (of which we shall speak hereafter), yet he was only bound to pay his proportion of what was actually owing. And, therefore, while the holder of the mortgage and the mortgagor, might include the sum of \$54.36, for interest paid for money borrowed, to purchase the same, and attorney's fees, yet it was manifestly improper to require complainant to pay any part thereof, before he could hold his property divested of the mortgage lien. When he purchased, he had notice of this mortgage, and the mortgagee, by virtue of his prior lien, had the right to subject the property to the payment of his debt. But he had no right to subject it to the payment of any sum that the mortgagor might con-

sent to include in the decree. Such agreement would bind the mortgagor, or, as in this instance, Coffindaffer and Griffey, who were not only the holders of the mortgage, but also interested as purchasers, of part of the mortgage premises.

Complainant further insists, that he should not have been required to pay any portion of the costs attending the foreclosure of the mortgage. We see no reason why he should not pay his portion of the costs, up to the time of the decree. These costs were legitimately made in enforcing a lien upon property, which he had purchased, and which he might have avoided, by making payment before suit brought. The costs subsequent to the decree, he should not pay, however. The sale was set aside for an irregularity, for which he should not be responsible, and to avoid the effect of which, was one object of this bill. It would be manifestly inequitable, to require him to pay any portion of costs which accrued under a void writ, which he in no manner procured.

And, finally, it is insisted, that complainant should only have been required to pay two-thirds of this incumbrance, in proportion to the quantity that he purchased, instead of three-fourths, or in proportion to its value. In this respect, we think the decree is correct. Here was a mortgage on three distinct parcels of real estate. Subsequent to the lien, one party purchases one parcel, and another two. When required to contribute, shall it be in proportion to the quantity or *value* of the premises, by them respectively purchased. We clearly think in proportion to the value. The other position, has no one equitable consideration to sustain it, while the rule followed by the court below, is fully sustained by reason, as well as authority. It would be an unconscionable doctrine, that would require A. who bought a ten acre tract, of no more value than the one acre that B. might purchase, to pay in such cases, ten times as much as B. The value of the several parcels, is what is presumed to have governed the mortgagee in taking this mortgage, and by this value, should the respective liabilities of the purchasers be measured. This view is sustained by the following, among other, authorities: Story's Eq. Jur. §§ 477, 478, 483; *Al-*

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drich v. Corper, 8 Ves. 391; *Dickey v. Thompson*, 8 B. Mon. 312; *Cheesebrough v. Willard*, 1 John. Ch. 415.

Indeed, upon this subject, we do not think there can be found any conflict—the authorities uniformly holding that value, and not quantity, should be the measure of contribution. Whether that value is to be determined with reference to the time of the mortgage, or subsequently, we are not called upon now to determine, as no such question is raised. We may say, however, that such value is in no case to be affected by improvements made by either purchaser.

But the defendants (*Coffindaffer* and *Griffey*) insist that complainant, having made his purchase after theirs, should be required to pay the whole incumbrance, or at least, that the lots purchased by him, should be sold, before they should be called upon to pay any part of the mortgage debt. On this subject, we are aware that the authorities are conflicting; and in this state the question has never, so far as we are aware, been decided. At one time, in New York, it was held, that such purchasers were bound to contribute in proportion to the value of their respective purchases. *Cheesebrough v. Willard et al.*, 1 John. Ch. 408; *Stevens v. Cooper*, Ib. 425. But these cases were regarded as shaken by the subsequent one of *Gill v. Lyon et al.*, Ib. 446, and still later, in the case of *Clowes v. Dickenson*, 5 Ib. 235, to have been entirely overruled. See, also, *James v. Hubbard*, 1 Paige, 228; *Gouverneur v. Lynch*, 2 Ib. 300; *Guion v. Knapp*, 6 Ib. 35. So that the rule in New York, now is, that the property purchased, is liable in the inverse order of its alienation. Such is the doctrine in Maine, South Carolina, and some other states. In Massachusetts, Ohio, Kentucky, and Tennessee, and other courts, it is held that the subsequent purchasers, shall contribute in proportion to the value of their respective estates, such value not to be appreciated, however, by any improvements placed thereon by the purchaser. *Parkman v. Welch*, 19 Pickg. 241; *Green v. Ranage*, 18 Ohio, 428; *Dickey v. Thompson*, 8 B. Monroe, 312; *Jobe v. O'Brien*, 2 Humph. 34; see, also, *Story's Eq. Jur.* § 1233,

where this latter doctrine is approved by the learned author, who states, also, that it is that maintained by the ancient, as well as modern, English cases on the subject; and such we believe to be the most equitable rule. Where a portion of the premises mortgaged, are subsequently sold, the mortgagor retaining the remaining part, it is uniformly held, that the portion unsold, should, in equity, first be subjected to the payment of the mortgage debt. For while the mortgage covers, and is a lien on, all the estate alike, yet the mortgagor, in addition to his legal obligation, arising, as well from the mortgage, as his covenants in his deed to the subsequent grantee, is morally bound to pay the debt, and divest that which he has sold, of any incumbrance. And in like manner, on his death, the heir, occupying his place, setting in the seat of the ancestor, or original grantor, is bound to discharge the debt to the extent of the assets descending; for there is no more equality of right between them, in such a case, than between the grantee and the ancestor, while living. When we come to settle the question, however, as between two grantees, purchasing different parcels of the incumbered premises, at different times, there is no more moral obligation on the one to pay, than the other. Both of them have purchased premises that are alike affected by a lien, which neither created, or undertook to pay. The purchased premises are liable to be sold, because of the failure of their grantor to discharge his undertaking, and not because of any failure on their part. In such cases, their interest is common—their rights are equal—and there should be equality of burden. It is difficult for us to see why the last purchaser, any more than the first, sits in the seat of the grantor; and yet this would appear to have been the reasoning used, and the ground of the decision, in *Clowes v. Dickenson*, 5 John. Ch. 240. And in those cases, where the question arises between the grantor and a subsequent purchaser, the grantor, or the land still held by him, is liable, because the debt is the personal obligation of the debtor, and not of the grantee. But where is the personal obligation resting on the last grantor, more than on the first?

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It is urged that the grantor, by aliening the unsold portion of the estate, cannot throw the burden of the mortgage, or a ratable part of it, back upon the first purchaser. It should be remembered, however, that we are not determining the relative equities of the grantor and purchaser, but of two purchasers. The personal obligation of the debtor remains the same, after, as before, the second sale.

The debtor is not inhibited from making a further sale, by reason of the covenants in his first deed. This power to sell, is as well known to the first purchaser, as any other fact connected with the transaction. It is the inability of the debtor to pay his debt, that creates the necessity for enforcing the lien, and not any failure on the part of the last purchaser. The junior, as well as the senior, purchaser, makes an absolute purchase; each pay a full consideration, and have a like reason to suppose, that the mortgage debt will be paid, and their estates held alike divested of the incumbrance. While each has purchased absolutely, yet, if the mortgage should not be discharged, they acquire no more than the right to redeem the parcel held by each, and neither should complain, if, by the decree which settles their respective rights, &c., he is secured the equity thus acquired, upon equal terms. We therefore conclude, that the decree of the court below was correct, in charging the purchasers with the payment of the mortgage debt, in proportion to the respective values of each parcel.

But as complainant should not have been charged with any part of the sum of \$54.36, included in the decree of foreclosure, nor yet with the costs attending the mortgage sale, the decree will be so far reversed, and in every other respect affirmed.

A procedendo will issue, directing a decree to be entered, in accordance with this opinion.

Allen v. Skiff.

ALLEN v. SKIFF.

The word *convenient*, in section 1708 of the Code, does not have reference alone to the county that is nearest in point of distance, or the one that can be soonest reached in miles' travel, from the county from which the venue is changed; but has a broader signification, and which county is the most convenient, must be determined, to some extent, by the peculiar circumstances of each case.

Where there is no showing to the contrary, the appellate court will presume that the county to which the venue has been changed, is the most convenient, within the meaning of the law.

If the party complaining wishes to show error in the order for the change of venue, he should embody all the facts, upon which the court acted, in a bill of exceptions, so that this court can see that the county selected, is *not* the most convenient.

The applicant for a change of venue, in addition to the costs of the transcript, should be required to pay the fair and legitimate costs of the term.

Appeal from the Jasper District Court.

IN this case, the defendant filed an affidavit for a change of venue, on the ground that the inhabitants of all the counties in the fifth judicial district, were so prejudiced against him, that he could not expect an impartial trial; and based upon this affidavit, he moved that such venue be changed to some other judicial district. The venue was accordingly changed to Madison county, in the ninth judicial district, and defendant adjudged to pay the costs of the term. The affiant objected to this judgment for costs, and also to sending the cause to Madison county, for the reason that said county, was "not the nearest one where the objections named did not exist." The objections were overruled, and defendant excepted. There is nothing in the record indicating upon what showing, aside from the affidavit, the court acted. Defendant appeals.

Clarke & Henley, for the appellant.

W. B. Sloan, for the appellee.

WRIGHT, C. J.—The only questions presented for our determination, are: *First*, did the court err in awarding a change of venue to Madison county? and, *Second*, should the appellant have been required to pay the costs of the term? .

The Code, section 1708, provides that in such cases, the venue shall be changed to the most convenient county to which there is no exception of the character stated. In this case, it is claimed, that many other counties are nearer, and therefore more convenient to Jasper county, than this county of Madison. It is true that Poweshiek in the fourth, and Mahaska in the third, districts, are nearer to Jasper than is Madison. But the word convenient, as here used, does not have reference alone to locality—to the county that is nearest, in point of distance, or the one that can be soonest reached in miles' travel. It has a broader signification; and which county is most convenient, must be determined, to some extent, by the peculiar circumstances of each case. In the first place, when two counties are equally distant, a case should ordinarily be sent to that, where the parties can probably have the most speedy trial. And again, the residence of the parties, and of their witnesses, must have an influence in making the selection. So, also, the convenience of the attorneys engaged on either side of the case, may well be consulted. These and other circumstances, are proper to be taken into consideration, as well as the relative distances of the surrounding counties; and where there is no showing to the contrary, we will presume that the county selected, is the most convenient, within the meaning of the law, as above construed. The presumption is in favor of the ruling of the court below, and when nothing is shown but the affidavit, we will not suppose that the county selected, is not the most convenient, though it may be at a greater distance than others. If the party complaining would show the order to be erroneous, he should embody all the facts upon which the court acted in a bill of exceptions, so that this court can clearly see that the county selected, is not the most convenient. Nothing of the kind is shown in this case, and we

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must presume that the venue was changed to the proper county.

We next inquire as to the order adjudging the costs of the term against the appellant. The costs occasioned by such change of venue, are to be paid by the applicant, and not taxed as a part of the costs of the case. Code, § 1712. This primarily contemplates, the costs of the transcript, as provided for in section 1710. We also think, the fair and legitimate costs of the term, should be paid by the applicant. Such costs are as much occasioned by the change of venue, as those attending the making of the transcript. The costs of witnesses, and the general costs of the term, are, by the change of venue, rendered practically of no use, so far as the trial of the cause is concerned, and should, therefore, be excluded from the general fee bill. The change of venue necessarily works a continuance of the cause, and the same consequences as to costs, should follow. This, of course, should only include the necessary costs which are thus rendered unavailing, and not such as have been unnecessarily or improperly made by the opposite party.

Judgment affirmed.

HOLLINGSWORTH, Executor v. SNYDER.

The papers referred to in section 1732 and chapter 133 of the Code, are not the private papers and notices between parties, in their ordinary business transactions, and which may relate to, or form the foundation of a right; but those intended in the statute, are such as pertain to, or may be required in, an action in court.

The service of a written notice to quit, by a landlord upon his tenant, cannot be proved by the written return and affidavit of the person making the service.

Appeal from the Des Moines District Court.

THIS is an action for rent, commenced before a justice of

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the peace, and taken by appeal to the District Court, where judgment was rendered for the plaintiff, against the defendant and his sureties in the appeal. The facts of the case will be found stated in the opinion of the court.

Browning & Tracy, for the appellant.

WOODWARD, J.—The deceased was landlord of the defendant, and caused a written notice to quit, to be served upon him. The service of this notice upon him, became essential in the trial. Such service was proved by the written return and affidavit of William Endsley, who does not appear, and is not claimed, to be an officer. Such mode of proof was objected to, but the objection was overruled by the court, and it was admitted without any other evidence thereof.

The court erred in admitting this notice upon this proof alone. The papers referred to, in section 1732, and chapter 183 of the Code, are not the private papers and notices between parties, in their ordinary business transactions, and which may relate to, or form the foundation of a right; but those intended in the statute, are such as pertain to, or may be required in, an action in court. If such a notice as the one in question, could be thus proved, so, also, might a notice of non-payment of a bill of exchange, or any demand which is necessary before suit, or before a right of action arises. It is true that the language of the statute is pretty broad, but the general subject matter of its provisions, the context, and the words "notices required by law," and all papers required to be served upon a party to an action or other proceeding, restrain us from an application of the provision to all the party's acts *in pais*. The proof of all such matters, must be subject to the common rule relating to cross-examination.

The judgment of the District Court is reversed, and a *procedendo* will issue.

SULLIVAN v. McLENANA.

Where land is purchased by one, with money furnished by another, a constructive trust arises, the former being a trustee for the latter.

In this country, we must look to the government and its grants, for the source of all title.

Where one co-tenant purchases in an incumbrance or adverse title, he is ordinarily held to do so, for all the co-tenants; but this doctrine does not apply to the case of co-occupants of the lands of the general government, where one shall have acquired title from the United States, in the absence of fraud, or special contract.

A tenancy in common can only be destroyed, either by uniting all the titles and interest in one tenant—thus bringing all the interests into one severalty; or by partition—giving all respective severalties.

A promise to pay more than ten per cent. interest, under the statute of 1843, is without consideration, and void.

Parol evidence will not be received to vary or contradict that which is evidenced by writing, and this doctrine applies in equity, as well as at law.

While an advance of money, may create a resulting trust, it must be subject to the rights of others, and cannot be allowed to intervene to defeat prior and superior equities.

Appeal from the Dubuque District Court.

BILL in chancery to settle the title to certain real estate. The facts, as we derive them from the pleadings and testimony, are, in substance, as follows: The land in dispute contains some 13.10 acres, and is situated near the city of Dubuque, on what is called the "Mineral Reserve." It appears that this so-called "reserve," was withheld from sale by the general government, until the year 1847, because of a claim made thereto by the heirs of Julien Dubuque, under an Indian grant. Previous to this time, however, a large number of persons had settled and made "claims" upon the reservation. Most of the "claims" appear to have been made for mining purposes, and without any regard to the government lines. The consequence was, that in many instances, several claimants were located, in whole or in part, on one, and some on several, legal subdivisions.

By virtue of the act of Congress, approved July 11, 1846,

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(Statutes U. S. at large, Vol. IX, 37), these lands were brought into market in March, 1847. The settlers, having in view the irregular shape of their "claims," and the difficulties growing out of conflicting lines and interests, in the fall of 1846, framed an association or combination, for the purpose of securing their lands. It was agreed by these articles of association, that there should be a public bidder, in whose name all the land should be purchased, unless the claimants of any particular subdivision, should agree upon some other form. A map was to be made of this mineral district, and the extent of each claim, and its owner, were to be marked thereon, as the same were settled and determined by the "claim committee." The public bidder, or the person so purchasing for the claimants, was, "immediately after such sale, to convey said lands to the persons respectively entitled to the same"—the persons, in all cases, furnishing the money to purchase the lands thus to be bid off for them, and paying the expenses of the conveyance. This association adopted a constitution or articles of agreement, and every claimant wishing to avail himself of its protection, was required to sign the same. It was signed by some seven hundred and fifty claimants, including the complainant, and by Sanford and Smith, agents and attorneys for Jane McLenan (widow), John, William, Bernard, and Margaret McLenan, heirs of B. McLenan, deceased. It also appears, that as early as 1836, one White made a claim on this reserve, containing, as far as now appears, about 72.53 acres. It is known as mineral lot No. 173, is of very irregular shape, and situated in four different sections, to wit: in sections 23, 24, 25, and 26, town 89, range 2, east. A part of this claim, containing 13.11 acres, extends on to the southwest of the southeast quarter of section 23, and is the land now in dispute. White sold to Coleman, and Coleman to O'Farrel and B. McLenan (the father of the respondents). O'Farrel afterwards sold his interest (being an undivided half), to one Tierman, and this interest was afterward, to wit: December 7, 1846, sold to said O'Farrel and the complainant. In February afterwards, O'Farrel sold one-half of his interest

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(being an undivided eighth), to one Pentecost, and at the land sales, it appears that the remaining interest of O'Farrel, was in one Levins. The map made as aforesaid, shows that the lot 173 was marked by the claim committee, as belonging, one-half to McLenans' heirs, one-fourth to complainant, and one-fourth to Levins and Pentecost, beside some one or two acres to other persons, not necessary to here name. All of this lot was entered in the name of the public bidder, George L. Nightingale, except this 13.11 acres, which were entered by John G. Shields.

The McLenans are non-residents, and as far as shown by the proof, have never resided on the land in controversy, or in the state. About the time the land was sold, in March, 1847, one of the McLenans was at Dubuque, and there made an arrangement and agreement with complainant, as respondents allege, by which he (complainant) was to see to paying respondents' portion that might be due for entering the lot, and to protect their rights in relation thereto. At the same time, complainant borrowed of the said McLenan, four hundred dollars, for which he gave him his note, due in one year, with ten per cent., secured by a mortgage on certain real estate of complainant; and respondents allege, that this verbal agreement as to the entry of the land, grew out of the same mortgage transaction, and that any money advanced by complainant to secure the McLenan interest, was afterwards to be paid. This agreement is sworn to by two witnesses. It appears that this mortgage was afterwards foreclosed, and the whole amount, with interest, paid, without any deduction or claim of offset, or payment, for money so advanced.

Some time after the land sales, it appears that complainant applied to Nightingale, for a deed for three-fourths of this lot, claiming that he owned that interest. Nightingale refused to so deed, for the reason that complainant's interest was one-fourth, and not three-fourths. Complainant thereupon filed his bill in chancery against Nightingale, praying that he be decreed to make this conveyance. To this bill, the McLenans were made a party; but were never served,

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however, and did not appear; and as to them, the complainant dismissed his bill. Nightingale having made default, a decree was rendered, requiring him to convey to complainant, an undivided three-fourths of said lot 173,—which conveyance he afterwards made, including the 13.10 acres in dispute. It is evident that the McLenans never advanced any money, to pay for the entry of their interest in this lot, unless complainant is regarded as their agent, in the advances made by him. While the testimony is not entirely conclusive, yet the burden of proof is, that complainant advanced three-fourths of the purchase money to the public bidder, and the different collectors.

In an early day, there was some improvement on the "claim," but for four or five years before the land sales, this improvement had been abandoned; but the claim was reputed and known as belonging to McLenan and others. After the land sales, and after complainant had, as was supposed, the legal title to three-fourths, and Levins a like title to one-fourth, they made an agreed partition—Levins taking about 18 acres on the east side of the lot, and complainant all the other part, containing some 54.40 acres, including the tract in dispute, and conveyed to each other accordingly. Complainant has, since the land sales, been in possession of the premises, has laid out a town on a part of the same, and the property has greatly appreciated in value. The McLenans have paid no taxes; the complainant has; but whether all that have been assessed, is not shown. At the time of the land sales, one of the McLenans' heirs was of age—the other two, minors; one of them arriving at majority in 1849, and the other in 1854. After the land sales, they had agents in this state for the payment of taxes, but for no other purpose. In May, 1854, one of the McLenans' heirs, visited Dubuque, for the purpose of seeing to the interest of said estate. Upon examination, it was found that the 13.10 acres in controversy, was entered by Shields, and not by Nightingale, and that the title thereto was still in Shields. At the request of said heirs, Shields then conveyed to them an undivided half of the same, and to Levins an undivided

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fourth—reciting the entry by him at the public land sales in 1847, in trust for the persons entitled thereto, and the receipt of the purchase money from the McLenans' heirs and Levins. Shields, as well as his grantees, knew of the claim made by complainant to the tract. In October afterwards, Sullivan files the bill in this case, making Shields, Nightingale, John, William, and Margaret McLenan, and Levins, parties—seeking to set aside the conveyance to McLenan and Levins, and claiming to have the equitable, and to be invested with the legal, title. In the court below, his bill was dismissed, and he now appeals.

Smith, McKinlay & Poor, and Wiltse & Blatchley, for the appellant.

Samuels & Cooley, for the appellee.

WRIGHT, C. J.—It will be observed, that the legal title to this property is in the respondents, McLenans and Levins, and complainant seeks to divert it. It is also evident, and not controverted, that when the conveyances were made by Shields, he and his grantees had notice that Sullivan claimed to own all the land, and denied the equitable right of any person else therein. We shall, therefore, treat the case, as if these conveyances had never been made by Shields; and as if he still held the legal title, in trust for the person entitled thereto; for as his grantees purchased with notice of his trust relation, they can take no better title than he had, and must be treated as trustees, holding the legal estate as Shields did. Let us suppose, then, that the legal title was still in Shields, and that Sullivan had filed this bill against him, and the other respondents, asking that Shields should convey to him all of the 13.10 acres, instead of one-fourth or one-half. Under the proof here made, would he be entitled to relief? And while the case is by no means free from doubt, yet we incline to answer this question in the negative, and shall so hold.

The case has been most fully and elaborately argued, and

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various questions of fact, as well as law, have been ably presented. As to the legal propositions involved, we think there is not much room for controversy, they being, for the most part, plain and well settled. For instance, as a general rule, where land is purchased by one, with money furnished by another, a constructive trust arises, the former being a trustee for the latter. So, also, it is true, that in this country, we must look to the government and its grants, for the source of all title. And, again, where one co-tenant purchases in an incumbrance or adverse title, he is ordinarily held to do so for all the co-tenants; but we hardly think, this doctrine would apply to the case of co-occupants of the lands of the general government, where one shall have acquired title from the United States, in the absence of fraud or special contract. And so, also, a tenancy in common can only be destroyed, either by uniting all the titles and interests in one tenant, thus bringing all the interests into one severalty, or by partition, giving all respective severalties. And, again, a promise to pay more than ten per cent. interest, under the statute of 1843, would be without consideration, and void. Neither can there be any doubt, as to the well settled and salutary doctrine, that parol evidence will not be received to vary, or contradict, that which is evidenced by writing; and that this applies in equity, as well as law.

These, and other propositions, maintained on either side of this case by counsel, are well understood, and generally conceded. The only question there can be, is as to their applicability, and this leads us to the facts; and here, again, there is scarcely room for controversy. At the time this land was sold, it is very evident that complainant's interest in the claim, was one-fourth. It is also clearly proved, that the father of the McLenan heirs did purchase one-half of the claim, and that so far as this purchase could give any right, it was held and retained until the land was sold by the United States. The other fourth was held by Pentecost and Levins. That Sullivan was aware of these respective interests and claims, is abundantly established. Indeed, he

does not in his pleadings, claim to have owned more than one-fourth of the claim before the land sales, and this he purchased in December, 1846, his deed reciting the interest of McLenan (one-half) to the same claim. The map of the mineral district shows their respective interests, and the articles of agreement show that McLenan, as well as Sullivan, had *some* interest or claim on the reserve.

But the complainant, while conceding all this, treats the claim title as void—as evidence of nothing, relying alone upon the government title, and the equities arising since the purchase; and to us it appears, that this very claim is fatal to his prayer for relief. Upon what ground is it, that he claims that Shields was his trustee, in purchasing the land? For whom did Shields become trustee, when he made this purchase? By virtue of what arrangement and agreement, did he occupy the trustee relation? To whom was he to make conveyances, in execution of his trust? The answer is found to all these questions, in this agreement or constitution made by the settlers, and nowhere else. By these articles, or this constitution, the bidder or purchaser was to convey "*said lands to the persons respectively entitled to the same.*" If the bidder or purchaser was not bound to convey to such persons—if he was not bound by this constitution or articles of association—then he was under no legal or equitable obligation to convey to any one; nor under any obligations of any kind, to any person, touching such lands so to be entered. And, therefore, unless complainant was one of these settlers, and entitled to the interest claimed in this land (or in the claim before its entry), he has no more right to call upon the purchaser to convey to him, than has an entire stranger to the transaction. Shields did not enter this land for any person that might ask it of him, any more than he entered it for himself. Neither should he be compelled to convey to any person, who may file his bill in equity, without establishing that he was a "claimant," and as such entitled to the land, and an execution of the trust. To our minds it is conclusively clear, that Sullivan, at the time this land was entered, had no interest

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therein, beyond an undivided fourth; and to that extent alone, did Shields become his trustee. He seeks to increase that interest, and to draw to himself the legal title to the whole tract, and in this, we think, his proof fails him.

But it is said, again, that this claim or settlers' association, was contrary to the laws of the United States, and the policy of the government in the sales of her public lands, and, therefore, could confer no rights, nor yet create any equitable interests, in the McLenans. If this was granted to its fullest extent, it would certainly not aid complainant. It is by virtue of these very articles, that Shields became his trustee, or he never did. If they are void, and the settlers thereunder have, no right to compel an execution of the trust; then complainant must fail, and the title must remain in Shields. And here, it is well to bear in mind, that it is complainant that is seeking to establish an equitable right to this land, and that the burden of proof is upon him; and that, unless he establishes such paramount right, he must fail, whatever may be the respective rights of the other parties. We, then, do not discuss the validity of these claim associations, regarding such discussion neither necessary or profitable to either party. It is further claimed, however, that complainant furnished the purchase money, and that a resulting trust was thereby created in his favor, as the owner of the money. The general rule upon this subject, we have before stated, and need not now repeat. And in disposing of this point, we may say at once, that we give but little, if any, weight to the verbal agreement set up and claimed by McLenans, in connection with the mortgage transaction; and did the case depend alone upon enforcing that agreement, we should probably find for complainant. Aside from every legal objection to the proof, the transaction as claimed, is so unwarrantable, and so clearly repugnant to the undenied conduct of the parties at the time, and the known experience and business habits of men, that we should hesitate before making it the basis of either granting or refusing relief to either party. But, aside from this, let us examine the complainant's claim to this land, based upon the advance

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of the purchase money. It does not follow, that because money may have been furnished by one party for the entry of land, that a trust thereby results, that cannot be explained or defeated. The general rule is as stated; but to this there may be, and are, exceptions. Let us take the very transaction now before us. Suppose Nightingale, the public bidder, had received money from a person who was a stranger to this entire tract of land; one who never had a claim thereon—who never became a party to the association, and who was never recognized as entitled to an interest therein by any committee or otherwise—and gave him a receipt showing that it was on a particular tract. After the purchase, Nightingale refuses to convey, it being evident that another person, than he who has advanced the money, is entitled to a conveyance, and that this was known to all parties at the time. Could this stranger compel him to convey, because he had advanced the purchase money, when the public bidder's undertaking, and his trust relation, required him to "obtain title," and convey the lands, to those to whom they "rightfully belong?" Most clearly not. It is very evident, that in this transaction, the claimant, in order to compel the execution of the trust, must not only advance the purchase money, but also be entitled as a claimant to the land; and no one could, by such advance alone, change the relation that existed between the purchaser and any other claimant—in the least prejudice the rights of such other person—or create a resulting trust that would defeat any previous known express trust. So that, while an advance of money may create a resulting trust, it must be subject to the rights of others, and cannot be allowed to intervene to defeat prior and superior equities. Complainant then, as before stated, at the land sales, had no right to more than one-fourth of this tract. To this extent, he was entitled, and no more. Thus far, and no further, did Shields become his agent or trustee. For the remaining portion, he became a trustee for others, and that with the knowledge of the complainant; and he could not increase his interest, nor decrease the rights of others, by advancing this money. If the ad-

vance was voluntary, it cannot help his claim; if for, and at the request of, the McLenans, then, of course, they must reap the benefit.

And, again, it is claimed, that when the patent for the land was issued by the government, all rights of the settlers, existing prior to that time, were cut off, and that the holder of the patent, took the land unincumbered by any squatter or claim lien or right. But how does this help complainant's case? He never has had a patent or title for this land, from any person authorized to convey, or having any interest to sell (except that from Levins, to which we shall refer), and he has, therefore, no such title, to be prejudiced by the claim or equity of the settler. It is the respondents who have the title, and that he seeks to divest, instead of his having title, and they claiming the execution of a trust.

If this conveyance had been made by Shields to complainant, recently after the land sales, and the McLenans were now setting up a claim to the one-half, based upon a prior "claim title"—the alleged agreement of March, 1847—and all the other circumstances disclosed, we might not feel inclined to disturb the title. There are many circumstances strongly tending to rebut such claim of the McLenans. Here, however, we have it clear, that McLenans did own one-half, and complainant one-fourth. A deed was never made by the trustee until 1854, and that to the party that appears to have been entitled to it. Complainant now seeks to set this aside. To do so, he should show that Shields was his trustee for the land claimed. This he has not shown, and must, therefore, fail; for though the McLenans had no equity in their defence, complainant cannot ask Shields to convey that, to which he shows no right by the agreement and contract under which the land was entered, or in any other manner.

We, therefore, think the decree was right as to the McLenans. We do not think, however, that the bill should have been dismissed. It appears, that so far as Levins is concerned, he sold his interest in this land to complainant, or in other words, they made an amicable partition of their inter-

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ests therein. Notwithstanding this, Levins procured afterwards, a conveyance from Shields, for one-fourth of this land. This he has no right to, and the decree should have been for complainant as to this interest. He is clearly entitled, by virtue of his original or claim right, and his purchase from Levins, to one-half of this tract of 13.10 acres, and to that extent, the decree should have been in his favor.

With this modification, the decree will be affirmed.

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The Supreme Court will regard no assignment of error, based upon the giving or refusing any instruction in the court below, unless it appears that exception was taken at the time, and the instruction embodied in a bill of exceptions, and made part of the record.

To make the instructions of the court a part of the record, they must be embodied in a bill of exceptions. Otherwise, they will not be so regarded, though they may be in writing, and copied into the transcript by the clerk.

Where, in an action by the assignee, against the makers and one of the indorsers of a promissory note, which note was secured by a trust deed on real estate, S., one of the makers, answered, admitting the execution of the note and deed of trust, and the assignment of the note, by G. to C.; averring that he knew nothing of the assignment by C. to plaintiff; that he understood the note was pledged by C. to plaintiff, as security for \$50 loaned, which he claimed had been paid; that the note had been fully paid, and the deed of trust canceled; and denying that the note is the property of the plaintiff; and where G., the indorser of the note, answered, admitting the assignment of the note to plaintiff; denying that the note or deed of trust is the property of plaintiff, and that any amount is due thereon; and averring that the note and deed were by him placed in plaintiff's possession, as a pledge or security for money borrowed, and that he did not thereby intend to transfer any right of action or general property to the plaintiff, but only a special property, until the money borrowed should be paid, and that the money loaned by plaintiff, had been paid or tendered to him by defendant; and where the replication of the plaintiff to these answers, denied the new matter set up, and averred that it was expressly agreed, that plaintiff was to collect the note of S., and pay himself the money loaned, with interest, and pay the remainder to C., and that C., with a view to defraud plaintiff, unlawfully entered upon the records, a cancellation of the deed of trust, and that the same was void, which replication was not denied; and

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where on the trial of the cause, the defendants offered to prove the value of the property pledged to the plaintiff, proposing to follow it up with proof that plaintiff had converted the pledge to his own use; that the property pledged was worth five or six times the amount of the sum for which the same was pledged; and that said property was pledged to secure the same debt for which this suit was brought, which evidence was sought to be introduced, after the defendants had given evidence of the sale of the trust property by the trustee, and a deed made to the purchaser, and which evidence was rejected by the court; *Held*, That the court did not err in refusing to admit the evidence.

Appeal from the Des Moines District Court.

JOHN SCOTT and John H. Scott, on the 13th of December, 1848, executed their promissory note to A. D. Green, for the sum of \$287.50, payable on or before the 9th of December, 1849, bearing interest after maturity, at the rate of ten per centum per annum, until paid. On the same day, they executed a deed of trust to Green, to secure the payment of the note. The note was assigned by Green to S. M. Clendenin. On the 14th of July, 1852, Clendenin being indebted to plaintiff in the sum of fifty dollars, as security for the payment of the same, assigned the note on the Scotts to plaintiff, and gave to plaintiff, the following writing:

"I have this day transferred to W. B. Ewing, a note on John Scott and John H. Scott, for \$287.50, with credit of \$155, paid December 2, 1841, accompanied by deed of trust, out of which, said Ewing is to have fifty dollars, with twenty per cent. interest, balance to Samuel Clendenin. Dated this 14th day of July, 1852. SAM'L M. CLENDENIN."

On the 5th day of December, 1852, Clendenin obtained twenty-five dollars from plaintiff, and gave the following receipt, in writing:

"Received, December 5, 1852, of W. B. Ewing, twenty-five dollars on account of a deed of trust, I assigned said Ewing on John and John H. Scott, in addition to fifty dollars, advanced on the 14th of July, 1852, and on same conditions, viz: twenty per cent. from date, till paid.

"SAM'L M. CLENDENIN."

There was a credit on the note of \$155, paid at various times, up to December 2, 1851, and a further credit of \$30, paid to plaintiff, February 1, 1853.

This suit was commenced by Ewing against the makers of the note, and Clendenin, one of the indorsers, October 3, 1854. The notice was served on John Scott and Clendenin. John H. Scott was not found by the sheriff. John Scott answers, admitting the execution of the note, and the deed of trust, to secure its payment, and the assignment of the note by Green to Clendenin; avers that he knew nothing of the assignment by Clendenin to plaintiff, but that he understood that the note was pledged by Clendenin to plaintiff, as security for fifty dollars loaned, which he claims has been paid to plaintiff; denies that the note is the property of plaintiff, and that any amount is due thereon to plaintiff, or any one else, and avers that the note has been fully paid, and the deed of trust canceled.

Clendenin admits the assignment of the note to plaintiff, but denies that the note or deed of trust is the property of plaintiff, and that any amount is due plaintiff thereon. He further avers, that the note and deed of trust, were by him placed in plaintiff's possession, as a pledge or security for money borrowed, and that he did not thereby intend to transfer any right of action, or general property, to plaintiff, but only a special property, until the money borrowed should be paid; and that the money loaned by plaintiff, has been paid, or tendered to him, by defendant. The replication of plaintiff denies, that there was no intention on the part of Clendenin to transfer the right of action on the note to plaintiff, and avers that it was expressly agreed, that plaintiff was to collect the note of Scott, and pay himself the several sums of money loaned, with interest, and pay the remainder to Clendenin. The replication also denies the payment or tender of said money to him by Clendenin, but avers that the same, with interest, is still due. The plaintiff further denies, that the note and deed of trust, or either of them, are paid and canceled, but alleges that defendant, Clendenin, with a view to defraud plaintiff, dishonestly and unlawfully,

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entered upon the county records, a cancelation of said deed of trust, and avers that Clendenin, at the time, had no right so to do, and that said cancelation is void. There is also a general denial of the answers of the defendants. To this replication, there was no rejoinder.

The plaintiff gave in evidence, the note and assignments thereon, and the receipts of Clendenin for the \$50 and the \$25, and rested his cause. The defendants offered to introduce evidence to the jury, which the court ruled out, and to which defendants excepted. This evidence is stated in the bill of exceptions, as follows: "After plaintiff had closed his testimony, defendants introduced a witness, to prove the value of the property pledged to said plaintiff, proposing to follow it up with proof, to show that plaintiff had converted said pledge to his own use, and that the property pledged, was worth five or six times the amount of the sum for which the same was pledged; and that said property was pledged to secure the same debt for which this suit is brought. The record further shows, that this evidence was sought to be introduced, after defendants had introduced the record of a deed from A. D. Green, trustee of the property or land pledged, by which deed it appeared, that Green, at the request of Ewing, the holder of the note, on the 6th of May, 1853, sold the land conveyed to him as trustee, to secure the payment of the note by the Scotts, under the deed of trust, for seven dollars, and made a deed to the purchaser. To the ruling out of this testimony, defendants except, and the bill of exceptions is made part of the record." The jury found a verdict for plaintiff, for the balance due on the note, and judgment was rendered against defendants, John Scott and S. M. Clendenin, for the amount. From this judgment, defendants appeal.

Browning & Tracy, for the appellants.

Starr & Phelps, for the appellee.

STOCKTON, J.—The first, second, and fourth assignments

of error, question the correctness of the decision of the court below, in giving certain instructions asked by plaintiff, and in refusing those asked by defendants. The charge of the court to the jury, was reduced to writing. The instructions asked by the plaintiff, were also in writing, as well as those asked by defendants, and refused by the court. The charge of the court, together with the instructions given and refused, are copied into the transcript. Whether they are properly a part of the record, and whether the giving or refusing of said instructions, can be assigned for error in this court, unless excepted to at the time, and the exceptions made part of the record, is our first inquiry. The doctrine has been too long settled, to be now disturbed, that this court will regard no assignment of error, based upon the giving or refusing any instruction in the court below, unless it appears that exception was taken at the time, and the instruction embodied in a bill of exceptions, and made part of the record. In other words, we will regard no errors which do not appear of record. To make the instructions of the court a part of the record, they must be embodied in a bill of exceptions; otherwise, they will not be so regarded, though they may be in writing, and copied into the transcript by the clerk. *Brewington v. Patton & Swan*, 1 Iowa, 121; *Harriman v. The State*, 2 G. Greene, 280.

The third assignment of error, is, "that the court erred in refusing the evidence offered by defendants in the court below." It does not appear very clearly, from the bill of exceptions, whether the evidence sought to be introduced by defendants, was intended to show the value of the land conveyed to Green by the Scotts, as trustee to secure the payment of the note; or whether it referred to the note itself. The bill of exceptions shows, that defendants offered to prove the value of the property pledged to said plaintiff, proposing to follow it up with proof, to show that plaintiff had converted the pledge to his own use, and that the property was worth five or six times the amount of the debt it was pledged to secure.

Without undertaking to decide, whether or not this evi-

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dence would have been proper, under some other state of pleadings, we are satisfied that it was properly ruled out, under the issues joined in this cause. Scott, in his answer, admits that he knew of the transfer, or pledge, of the note, by Clendenin to Ewing, and that while the note was in Ewing's hands, he had paid him fifty dollars on it, but denies that the note was the property of Ewing, and avers that the note had been fully paid, and the deed of trust canceled. Clendenin, in answer, avers that the note and deed of trust were placed in plaintiff's possession, as a pledge or security for the sum of \$50, borrowed, to be repaid in six months, with interest; that the amount has been paid, or tendered to plaintiff; and that the note and deed of trust were no longer the property of plaintiff, and that nothing was due plaintiff thereon. The replication of plaintiff avers, that it was expressly agreed, that plaintiff was to collect the note on Scott, and pay himself the said sum of \$50, and also \$25, borrowed of him by Clendenin, with interest, and pay the remainder to Clendenin; denies that the money borrowed had been tendered him; that the deed of trust and note, or either of them, are paid or canceled; avers that Clendenin unlawfully entered a cancelation of the deed of trust on the county records, and that said attempted cancelation is void, as at the time, plaintiff, and not Clendenin, was the owner of the note and deed of trust; plaintiff also denies, specifically, the answers of defendants.

The issues joined were: *First*, whether the money lent by Ewing to Clendenin, had been repaid to him, with interest; and *Second*, whether the Scotts had fully paid the note sued on. Any evidence tending to elucidate these two questions, would have been relevant, and should have been admitted. The defendant introduced and read to the jury, a deed made by A. D. Green to Jno. G. Foote, for the land conveyed by Scott to Green, as trustee, to secure the payment of the note assigned to plaintiff. Green, at the instance of Ewing, the holder of the note, had advertised and sold the land under the deed of trust; it brought only seven dollars at the sale, and Green conveyed the land to the pur-

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chaser. We take it, that the offer of the defendant was to show the value of this land, and that plaintiff had converted it to his own use. We are not certain that this was the object of defendant, owing to the obscurity of the language used; but we cannot arrive satisfactorily at any other conclusion. It is true that it was the note that was pledged to Ewing, and we might be led to suppose from this fact, that the language of the bill of exceptions was intended to refer to the note of Scott, and to its conversion by plaintiff; but it can hardly be seriously contended, that plaintiff had converted the note to his own use, by bringing suit on it. Ewing had acquired a special property in the note, by the assignment—the general property remaining in Clendenin, who had the right of redemption, even after default made by him in complying with his engagement. 2 Kent's Com. 452; Story on Bailments, § 308. After the time stipulated for payment of the money borrowed of him, by Clendenin, Ewing might either sell the property pledged, or if, as in this case, it is a negotiable instrument, he might bring suit upon it, to enforce the collection of the amount due him from the pledgor.

The assignment of the note, so far as it transferred the property therein to Ewing, carried with it the right to any security the makers of the note had given to the original holder. Upon default made by Clendenin, Ewing, as the assignee and holder thereof, had the right to require Green, the trustee, to sell the land conveyed to him by Scott, to secure the payment of the note. If the land, when offered at public sale, did not bring enough to pay the note, or did not sell for its full value, we do not see that such failure can be in any manner attributable to plaintiff, or that he can on any safe ground, be held to accountability, as having, by requiring the land to be sold, converted the security to his own use. It does not appear from the bill of exceptions, that there was any evidence offered, to show that Ewing had been paid his money loaned, with interest, or that it had been tendered him; nor is it contended that the evidence excluded by the court, would have tended to prove that

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fact. The defendant, Scott, having admitted in his answer, that he was informed of the transfer of the note to plaintiff, and that after such transfer, he had paid a part of it to plaintiff, any evidence going to show that after such transfer and notice, Scott had paid the note to Clendenin, and procured Clendenin to cancel the deed of trust, was clearly inadmissible. We do not see how the evidence sought to be given by defendant, and excluded by the court, could have been properly received under the issues joined. Such evidence could only have amounted to this: that the land, at the instance of Ewing, had been offered at public sale by Green, the trustee, and had not brought as much as it was worth. Under what state of pleading, in this cause, any such testimony would have been admissible, we will not undertake to decide; but we are clearly of opinion, that there was no error in the rejection by the District Court, under the state of pleading the record exhibits.

Judgment affirmed.

SHARP v. THE STATE OF IOWA.

The transcript of the proceedings upon the record, mentioned in section 3273 of the Code, which provides that upon the making of an order granting a change of venue, the clerk must make out and certify a transcript of all the proceedings appearing upon the record of the court, &c., relates to the entries made in what is known as the "record book," under section 145, which, with the other books therein mentioned, and the papers in the different causes, constitute the records of the court.

Where the plaintiff in error, on the 18th day of April, 1856, was indicted for murder in the Delaware District Court, and on the same day was arraigned, and obtained a change of venue to the county of Dubuque; and where, after the venue was changed, the clerk of the court made out a certified copy of the record entry, the finding of said indictment, defendant's application for the change of venue, and the order granting the same, which transcript, together with the indictment, and other papers, were placed in an envelope, and by the clerk of said Delaware District Court, presented and filed, in term time, in the Dubuque District Court, the clerk of the latter court indorsing the filing of the same with him, on the outside of the envelope; and where

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the indictment was not attached or annexed to the transcript, nor were any papers so deposited by the clerk of Delaware county, marked as filed in the Dubuque District Court, except by the indorsement of filing made on said envelope; and where it appeared from the record, that the indictment was found at the "March term, 1856, of the Delaware District Court, begun and held by adjournment, on the 15th day of April, 1856," and that it had been regularly presented as a true bill by the grand jury, and regularly marked as filed by the clerk of that court, as required by the Code; and where the defendant at the ensuing May term of the Dubuque District Court, was tried and found guilty of murder in the second degree, and after verdict, filed his motion in arrest of judgment, on the ground that the Dubuque District Court had no jurisdiction over the case, and that, under the circumstances, it was irregular to put the defendant on his trial, which motion was overruled; *Held*, That these objections could not avail after verdict, and that the motion was properly overruled.

Whether the term of court is a special term, as provided for by section 1569 of the Code, or a continuance of the regular term (that having been adjourned over), it is competent for the grand jury, if impaneled, to inquire into offences.

It is not necessary that a transcript from the District Court, should show affirmatively, when, or how, or under what circumstances, the regular term of that court was adjourned.

This court will not presume against the regularity of the proceedings, after verdict, as to those matters which the law does not require to be incorporated in, or shown by, the transcript.

Error to the Dubuque District Court.

On the 13th day of April, 1856, the plaintiff was indicted in the Delaware District Court, for the murder of one Joshua F. Stout. On the same day, he was arraigned, and filed his written plea of not guilty. He then applied for and obtained a change of venue to the county of Dubuque, and at the May term in that county, was tried, found guilty of murder in the second degree, and sentenced to imprisonment in the penitentiary for ten years. After verdict, he filed his motion in arrest of judgment, which was overruled. The overruling of this motion, is the only error now assigned. The facts material to the consideration of the questions arising on this motion, will be found in the opinion of the court.

W. T. Barker, for the plaintiff in error.

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D. C. Cloud, attorney-general, and *B. M. Samuels*, for the state.

WRIGHT, C. J.—It appears from the record, that this indictment was found, at what is styled in the transcript, "an adjourned term," of the Delaware District Court. After the venue was changed, the clerk of the court made out a certified copy of the record entry of the finding of said indictment, of defendant's application for said change, and the order granting the same. This transcript, together with the "indictment and other papers," were placed in an envelope, and by the clerk of said Delaware court, "presented and filed," in term time, in the Dubuque District Court, the clerk of the latter court indorsing the filing of the same with him, on the outside of the envelope. The indictment was not attached or annexed to the transcript, nor were any of the papers, so deposited by the clerk of the Delaware court, marked filed in the Dubuque court, except by the indorsement of filing aforesaid, on said envelope. The indictment, appears, however, to have been regularly presented as a true bill, by the grand jury of Delaware county, and regularly marked as filed by the clerk of that court, in strict accordance with the Code.

The counsel for the defendant now claim, that under these circumstances, the District Court of Dubuque county, had no jurisdiction, and that the motion in arrest, should, for that reason, have been sustained. Many grounds are assumed to sustain this general proposition, the most material of which, we now proceed to notice.

The first objection involves a construction of section 3273 of the Code, which provides, that upon the making of an order, granting a change of venue, "the clerk must make out and certify a transcript of all the proceedings appearing upon the record of the court, which, together with the indictment and all the papers in the cause, must be transmitted to the clerk of the court to which the venue has been changed." Under this section, it is claimed, that the clerk, instead of transmitting the original indictment, should have

sent a copy, and retained the original in his office, and that the court had no power to try the defendant on the original, so transmitted. We do not think this position is tenable. The "transcript of the proceedings upon the record," mentioned in this section, we think, relates to the entries made in what is known as the "record book," under section 145 of the Code, which, with the other books therein mentioned, and the papers in the different causes, constitute the records of the court. Any other construction, would require him to make a transcript of the record, indictment, and all the papers, and to transmit this, as well as all the original papers, including the original indictment. This construction, we think, is unwarranted; nor do we think the legislature could well have employed more appropriate language, to define the duties of the clerk, in this respect.

It is next claimed, that the indictment, not being attached or annexed to the transcript or other papers, there was nothing to identify it; and that it was therefore, irregular, to put the defendant on his trial thereon. In considering this, as well the other objections urged, it must be borne in mind, that they were raised for the first time after plea, application for change of venue, trial, and verdict, and whatever force many of them might have had, if urged before trial, we are clear that they cannot avail after verdict. It is true, that the defendant should be tried upon the indictment, and none other, which was presented by the grand jury of Delaware county. Can there be any reasonable doubt but that he was so tried? Here we have the original indictment, with all of the necessary statutory indorsements, properly signed by the prosecuting attorney of the proper county, deposited with the clerk of the Dubuque court, with a certified copy of the proceedings from the "record book," and upon this indictment, the defendant goes to trial, without any suggestion or objection, that it is not the "true bill," found by the grand jury of Delaware county. And while it is true, that no presumption shall obtain against the prisoner, it is equally true, that courts should not indulge in unreasonable presumptions in his favor. It would have been better for the

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clerk to have attached the papers all together, so as to have removed all possibility of controversy in this respect; and we may say again, as we have heretofore, that more care in the making up, and transmission, of papers and records, is imperatively demanded at their hands. But for an irregularity of this kind, we would not feel justified in ordering a new trial, when urged for the first time after verdict. On this subject, see *Wau-kon-chaw-neek-kaw v. The United States*, Morris, 332; *Holliday v. The People of the State of Illinois*, 4 Gilm. 711.

This last case is, in many respects, very similar to this, and is a decision of the point now being considered. There, a change of venue was granted, and the transcript showed the finding of the indictment, and contained a copy thereof, and of the proceedings. The records of the county to which the papers were sent, showed that the original indictment was received with the transcript, but there was no certificate to the transcript, showing that the paper so transmitted, was such original indictment; and it was held, that such omission ought not to vitiate the proceedings. See, also, *State v. Beauchamp*, 6 Blackf. 299.

It is said, again, that it does not appear that the indictment was found at any term of the court of Delaware county, known to the law. The record shows it to have been found at the "March term, 1856, begun and held by adjournment, on the 15th of April, 1856." This is shown by the caption of the transcript transmitted to Dubuque county, and also by the indictment. Whether this was designed to be a "special term," as provided for in section 1569 of the Code, or a continuance of the March term (that having adjourned over), is not perhaps entirely clear, nor do we think it material. We have no doubt but it would be competent for the grand jury to inquire into offences, if impaneled, whether this is considered an adjourned or special term. If a special term, then the power is expressly given by section 1571 of the Code. If considered as the continuance of the regular March term, then it was the regular grand jury of that term, with full power to inquire

into offences committed in that county. Nor is it necessary that the transcript should show affirmatively, when, or how, or under what circumstances, the regular term was so adjourned. If this is required, why should it not also show, that the proper oath was administered to the grand jury, or whether defendant had an opportunity to challenge the panel, or particular jurors, or that the jurors were all regularly drawn, selected, and summoned, as well as various other matters necessary to be performed or observed, but which need not appear on the transcript affirmatively, to make a conviction regular. The truth is, that after verdict, all such objections come too late. Why were they not made before? If the defendant was not in custody when the grand jury was impaneled, he, at least, was at the time of filing his plea. No reason is shown for not making these objections at that time, or before trial. It is not strictly true to say, that a defendant in such cases, waives nothing by going to trial. He waives many things. It is quite as necessary that this should be so, as that provision should be made for trial at all. What he does waive in the various cases that may arise, it is not necessary now to determine, further than to say, that the objections here urged came too late, without further showing than is here made. We will not presume against the regularity of the proceedings, after verdict, as to those matters which the law does not require to be incorporated or shown by the transcript.

Other objections are urged by the defendant, based entirely upon the alleged insufficiency of the record transmitted from Delaware county, to evidence the jurisdiction of the Dubuque District court. As they are, however, of far less weight than those above noticed, are not relied upon by counsel, as at all prominent, and are virtually disproved of, by the principles above laid down, we pass them, without referring to them in detail.

Judgment affirmed.

Ham v. Steamboat Hamburg.

HAM v. STEAMBOAT HAMBURG.

An action against a steamboat, under chapter 120 of the Code, is a proceeding *in rem*.

In order to give the court jurisdiction in such cases, it is necessary that the warrant issue, and seizure of the boat be made, as required by section 2121 of the Code.

When a new and special right or power is given, and its mode and circumstances are prescribed, these must be obeyed substantially.

And where a proceeding was commenced against a boat, and the notice was returned, with the following service: "Served, this 12th day of June, 1855, the within notice on the within named steamboat Hamburg, by reading the within notice to Capt. Estes personally, who is at present master of said boat, and by leaving with him a copy of the written notice;" and where no warrant was issued, and there was no evidence that the boat was taken into the possession of the officer; *Held*, That the court properly dismissed the action, on motion, on the ground that the boat was not attached in accordance with law.

Appeal from the Dubuque District Court.

THIS is an action against the steamboat Hamburg, for supplies furnished her. The supplies were furnished in St. Louis, state of Missouri. The action was brought in Dubuque county, Iowa. The notice is returned with the following service: "Served, this 12th day of June, 1855, the within notice on the within named steamboat Hamburg, by reading the within notice to Capt. Estes, personally, who is at present master of said boat, and by leaving with him a copy of the within notice." No warrant issued, and none was served, and there is no return nor evidence that the boat was taken into the possession of the officer. The action was dismissed, upon motion, assigning the cause that the boat was not attached in accordance with the act in such case made and provided.

Wiltse & Blachly, for the appellant.

Trip & Pollock, for the appellee.

WOODWARD, J.—The Code, chapter 120, provides that any boat found in the waters of this state, is liable, first, for debts contracted by the master, owner, agent, clerk, or consignee, for supplies furnished for the use of the boat, or work done, or materials furnished, in building, fitting out, furnishing, or equipping such boat. The action is brought under this, the first clause of section 2116. The petition must be sworn to and filed with the clerk (or justice), who shall thereupon issue a warrant to the officer, commanding him to seize the boat, &c., and detain the same, until released by due course of law. She may be released before judgment, upon a proper bond being given, as in the case of the attachment of personal property. Any person interested in the boat, may appear, either personally or by attorney, and defend. Besides the warrant and seizure of the boat, "the usual notice shall also be issued, directed to the boat by name, and served upon the master, owner, agent, clerk, or consignee; and if none of them be found, by posting a copy in some conspicuous part of the boat. The warrant shall be served according to the direction it contains." Section 2122.

The plaintiff contends, that the warrant and seizure were for his security and benefit, and may be waived. The defendant contends, that they are essential to confer jurisdiction. We are inclined to the latter opinion. The plaintiff may sue the owners in the usual manner. But, on account of the difficulty of finding out the owners, and of reaching them, and the nature of the business of boats leading them to pass from one part of the country to another, the statute permits a party to sue the boat itself, by its name. It then becomes a proceeding *in rem*, perhaps strictly so. It is certainly more so, than a suit commenced by attachment against a non-resident. It is very similar to admiralty proceedings against vessels, for wages, &c. In such cases, the thing must be within the reach of the court, and in the custody of the law. In *Paine v. Mooreland*, 15 Ohio, 435, the court say: "A court acquires jurisdiction by its process. If the process of the court be executed upon the person or thing,

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concerning which the court are to pronounce judgment, jurisdiction is acquired. The writ draws the person or thing within the power of the court; the court once having by its process, acquired power to adjudicate upon a person or thing, it has what is called jurisdiction. This power or jurisdiction, is acquired only by its process. To give jurisdiction, is the object of process." In a case like the one at bar, the principal process is the warrant, by which the boat is taken, and thus is brought within the jurisdiction of the court. The service upon the master, agent, &c., is not the essential, for if they are not found, the notice may be posted up in the boat, which, of itself, contemplates a seizure, and this is analogous to the case of an attachment against a non-resident. In such case, the attachment is the essential, and publication may be made for the person.

In the case at bar, it does not appear that the boat was even "found in the waters of the state." The usual notice, under section 2122, is served on the master of the boat, but the boat may be in Louisiana, for aught that appears. It may strike the mind as strange, that a seizure is essential, but it would be still more strange to the legal view, if the court could take jurisdiction, when neither person nor boat, was shown to be within its jurisdiction. And another rule has force here. When a new and special right or power is given, and its mode and circumstances are prescribed, these must be obeyed substantially. Such is the law of mechanics' liens, which is a new remedy; and so it is of these remedies against boats.

Judgment affirmed.

EYSER v. WEISSGERBER.

Where it is evident that foreign or inapplicable instructions could reasonably have misled the jury, to the appellant's prejudice, the appellate court will reverse the case, and order a new trial; but not so, where the prejudice is not manifest.

Where, in an action for materials furnished, and work and labor performed, the petition stated that the parties entered into a contract, by which the plaintiff undertook to furnish materials and perform work and labor for a building, agreeably to a certain account or statement in writing, a copy of which is attached to the petition; and where the account or statement in writing, attached to the petition, was a bill of prices for certain described materials and work, and was signed by the parties, but contained no undertaking by either, nor any stipulation of any character; and where the court instructed the jury, that there was no written contract between the parties; *Held*, That the statement or account did not possess the first ingredient of a contract, and that the instruction was correct.

It is the duty of a court to determine, and so inform a jury, whether a writing introduced in evidence, is, or is not, a contract, or that which fixes the liability of the parties in the premises.

Where the instructions are so confused, that it is evident that the jury was misled, and acted at random, to the probable prejudice of the appellant, a new trial will be ordered.

But where the instructions in chief, and those asked by, and given for, the appellant, are conflicting merely, and the latter are incorrect, such conflict will not be a sufficient cause for reversal.

Where a party declares specially, he must succeed upon his special case and cannot recover as upon the common counts.

Where a party would recover for the reasonable value of services rendered, or materials furnished, upon a special contract, he must either declare in general assumpsit, or unite the common, with the special counts.

Whether, if a contractor abandons his contract, without the fault of the employer, he can recover what the work done is reasonably worth, under a proper petition, *quere?*

Where the materials, work, time, and manner of performance, are contained in a special contract, but the price to be paid is not fixed, it is proper to set forth the contract, and seek to recover what the services and materials are reasonably worth.

While by our practice, the appellate court will not inquire into the correctness of instructions given or refused, unless the party objecting has the same incorporated in a bill of exceptions; yet it is not necessary that he should except separately to each proposition contained in the instructions. A general exception to the entire instructions will, ordinarily, be sufficient.

But the judge below, or the opposite party, may, in such cases, require the

2	463
87	551
2	463
106	373

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party excepting, to point out the specific portion or portions of the instructions to which he objects, so as to call the attention of the court to the objectionable matter.

Where the exception is to the whole charge, and greater particularity does not appear to have been required in the court below, errors may be assigned so as to obtain a review of any part of such instructions.

Appeal from the Scott District Court.

THE plaintiff seeks to recover for materials furnished, and work and labor performed, on a house for defendant, and asks a mechanics' lien. The petition, as amended, contains two counts. The first states, that in March, 1854, the parties entered into a contract, by which, plaintiff undertook to furnish materials, and perform work and labor, for a building to be erected on certain real estate, described in the petition, and alleged to be owned by the defendant, "agreeable to a certain account or statement in writing," a copy of which is attached to the petition; that it was agreed, "that what work petitioner would perform, and what materials he should furnish, in and about said building, should be performed and furnished at the rates specified in said account or statement; and that payment should be made for the same, as fast as such materials and labor should be so furnished and rendered," and that petitioner did furnish materials, and perform work, in and about said building, as stated in an account annexed to his petition—which account professes to contain a full statement of all work performed, and materials furnished, as also all sums paid by defendant on said contract. The second count, after setting forth the substance of what is contained in the first, proceeds to state, that before said work was completed, and before payment therefor had been made, the building, which was in part erected, blew down, and was to a great extent destroyed; that petitioner then, not having received his pay from defendant, according to his contract, declined doing further work, or furnishing other materials, until a further agreement was entered into; that thereupon defendant promised, that if petitioner would complete said work, and finish said

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building, as had been originally agreed, he would pay him the full sum which all the labor and materials were worth, and would indemnify him for all damages which he might sustain, or losses, and would make the same good to him on the completion of the work; and that under the agreement, petitioner recommenced work, found the materials, and finished and completed the contract, as he was bound to do by the original agreement." The "account or statement in writing" referred to, appears to be a bill of prices, for certain described materials and work, and is signed by the parties, but contains no undertaking by either party, nor any stipulation of any character.

The answer admits the making of the "contract" contained in said "statement in writing;" claims that said contract is entire; and that plaintiff was thereby bound to finish the whole work before he was entitled to any pay; admits that in the year 1854, plaintiff did work on the house on the lot described, and furnished timber therefor, under said contract, and none other, but not to the amount charged in plaintiff's account; denies any other contract, and especially the one set up in the plaintiff's petition, as being made after the fall of the house; denies that he failed to make payment as provided in the original contract, or that plaintiff ever recommenced the work, and finished and completed the contract as he was bound to do, by his original agreement; and denies the indebtedness to the amount claimed, or that plaintiff is entitled to a mechanic's lien for that sum. The testimony is all contained in a bill of exceptions, and so far as relates to the contract, is in substance, as follows: One witness swears, that after the house blew down, the parties were talking about it, and he heard defendant tell plaintiff, to go on with his work, and he should lose nothing by it. Another says, that defendant told him, that plaintiff should not suffer because the house blew down. Another swears, that defendant said, that if plaintiff would go on and finish the building, he should not lose anything. By another witness, it is proven that Eyser was originally to furnish all the materials, and do all the wood work of the house, and

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was to be paid as his work progressed. It appears by one witness, that defendant went to New Orleans in July, 1854, and did not return until after this suit was commenced; and by another, that just before he left, he told plaintiff to finish the building as soon as he could; that defendant would pay him every cent; and that if he did not return soon enough, he would send the money to witness to pay him; that plaintiff agreed to go on and finish the work. This same witness, who was defendant's agent, states in answer to the cross-examination of plaintiff, that he knows of no new contract, and that if there had been, he thinks he would have known it. There is a vast amount of testimony as to the quantity of materials furnished and work done, and the exact value thereof, is difficult of ascertainment. It is quite conclusively shown, that plaintiff abandoned the work, within a few days after defendant left for New Orleans—which was soon after the building blew down; that he did not furnish all the materials and do all the work in and about the house; and the only reason for the abandonment, given by plaintiff, was that he was afraid he would not get his pay, and that he would not advance money for lumber. So far as material, the instructions will be found referred to in the opinion of the court. The verdict of the jury was in favor of plaintiff. A motion for a new trial, for various specified causes, was overruled. A motion in arrest was also overruled, and judgment for the amount of the verdict, and the same made a lien on the building and lot described in the plaintiff's petition. The defendant appeals, and assigns for error the following:

1. The court erred in the charge given by the court to the jury.
2. The court erred in giving the instructions asked for by the plaintiff.
3. The court erred in giving instructions directly in conflict.
4. The court erred in refusing a new trial, and in overruling the motion to arrest the judgment.

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Whittaker & Grant, for the appellant.

I. The charge of law, given by the court to the jury, on his own suggestion, is erroneous in the following points :

1. The court erred in saying, that no written contract had been established. This was an error of law, because the court had no right to say what was, or was not, proved. It was an error of fact, because the plaintiff says, the contract was, in part, reduced to writing, and the proof was all originally reduced to writing. The contract was a specification of work to be done, materials to be furnished, and price to be paid. Parol evidence was, and could properly be introduced to apply that work to its subjects, but not to modify, or change, or control the written terms. The court afterwards said, that this question was one for the jury, but that did not do away with the injurious effect of his erroneous charge, that no written contract had been established or produced.

2. The court erred in charging the rule as to deviations, from a special agreement (Sedgwick on Dam. 221), because it was not law applicable to this cause. This was not a case of deviation, but a case of non-performance. There was no question about a deviation from the original contract ; there was no question about extra work. The question, and only question, was performance—performance of the written contract. It was proved, beyond cavil, that there was no performance of the first contract, or of the new contract, after the building fell down. The allegations of the plaintiff, and the issues, are on this new contract, which was, that the plaintiff and defendant agreed that the plaintiff was to go on and finish the work as originally contemplated—to do all the wood work, and furnish all the wood materials, for the building, except, that it was to be two stories, instead of three. The question, and sole question was, did the plaintiff perform the contract? The proof shows that he did not. Was he entitled to recover anything?

3. The third erroneous part of the court's charge, to which we ask attention, was, that the rule adopted in *Britton v. Turner*, 6 N. Hamp. 497, said to be approved in 11 Vermt.

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560, and 12 Ib. 625, was law. *Britton v. Turner*, was a case for wages, on a contract to work for a year, and abandonment without cause. The court say, that the party failing to perform his contract, can recover what it is worth, to the defendant, though he has not performed the condition precedent; and they charged the jury in this cause, in effect, that the plaintiff could recover on a *quantum meruit*, though he had refused to perform and complete his contract; and the court gave that charge, on a petition, where the plaintiff averred a performance, and had no count for a *quantum meruit*. The court overruled the decision of our own state court, on this very question. The error into which the court, and the other side fell, was, in taking and following those cases, where a job for building a house is finished, but with deviations from the original contract, and the deviations are assented to by the defendant. There is not a case in the books, where a plaintiff has recovered on a contract for building a house, where he has abandoned the work, and refused to perform the contract. The proof in this cause, shows that the pretence set up by the plaintiff, of a failure to pay him as the work advanced, has no foundation. The plaintiff told the defendant, when he made the second contract, that he had no fears about his pay. His object in making the new contract was, to secure pay for the work lost by the falling of the house. He made a new contract to complete the house two stories high, and when finished, he was to be paid for his whole work. This new contract, which involved an expenditure of nearly five hundred dollars, he abandoned the day after it was made, and never afterwards did a day's work under the contract.

This question has been very satisfactorily settled in *Bush v. Chapman*, 2 G. Greene, 549.

"By his declaration," says WILLIAMS, C. J., "the plaintiff has made the written agreement, the gravamen of his action. He avers a complete performance, and sues for the price of the work, as therein stipulated. He seeks to enforce the payment of the price, on the ground, that he had, by the 1st of February (three months after the time set up in the

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contract), completed the work, notwithstanding the failure of Bush to comply with his contract to furnish materials, at the stipulated time, so as to enable him to proceed with the work, as required by the agreement. At the same time, he declares upon the common counts, for work and labor, &c., and thereby claims the benefit of an adjustment of his rights, independent of the written contract, so as to enable him to recover for the value of his work, upon the evidence thereof; and also has damages for hindrances, &c., by the defendant, in not fulfilling his undertaking. This cannot be allowed. If a plaintiff sue on a written or special contract, so as to make it the basis of his action, it must regulate his right to recover, as well as the amount recovered. In this case, it is clear, that the plaintiff did not consider the written contract, if violated by the defendant, at an end, when the failure to perform on his part, occurred; but that on the contrary, he treated it as subsisting and in force. He proceeded on it, completed the work, and made it the ground of his action at law. By asserting the binding effect of the special contract, claiming the benefit of it, and making it the gravamen of his action, he is precluded from the recovery of any damages for delay, &c. This doctrine is recognized and asserted in *Chitty on Contracts* (5 Am. ed.), 570, note 2, referring to *Shaw v. Lewiston T. P. Co.*; 5 Penn. 445. In disposing of that case, O. J. GIBSON says: "If the company had put it into his power to dispense with the contract, it was his business, either to take advantage of the omission, by declaring the contract at an end, or waive the consequences of default, by treating it, as subsisting. The plaintiff not only treats the contract as subsisting, but claims to recover damages for delay, hindrances. The action being brought on the written contract, the plaintiff cannot recover damages not stipulated for in it." To this effect, see 9 Ala. 106; 11 Ib. 377; 1 G. Greene, 408; 14 Maine, 364; 1 Shepley, 60; 4 Pick. 114; 19 Ib. 849.

Britton v. Turner, is not law in this state, nor anywhere else. It is not sustained by a single decision in America. The case in 11 Vert. 360, was decided on the ground, not

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law, it is true, that the laborer was excused by sickness; and 12 Vert. 625, was decided on an entirely different point. In all cases, where there is a special executory contract, and the work is not performed, the plaintiff can recover nothing on a *quantum meruit*, while the contract is executory. 1 Parson's on Cont. 522, 540; *Clark v. Smith*, 14 Johns. 326; *Rees v. Lewis*, 8 Car. & P. 124; and *Silevery v. Fogg*, 5 Mee. & W. 83; a case where there was fraud, and no abandonment. Where a party abandons a contract, he can recover nothing on a *quantum meruit*. This is the rule in England. *Cutler v. Powell*, 6 Term R. 320; *Ellis v. Hamlin*, 3 Taunton, 52; *Hull v. Hughman*, 2 East, 145; *Sinclair v. Bowles*, 9 B. & Cr. 92; *Spaun v. Arnott*, 2 Starkie, 256; *Waddington v. Oliver*, 5 Bos. & Pul. 61; *Walker v. Dixon*, 2 Starkie, 281; *Kingston v. Cox*, 5 Man. G. & I. 522.

The same principle, that where a party fails to perform an executory contract, he can recover nothing, has been decided in the following states: Maine, *Miller v. Goddard*, 34 Maine, 102. New Hampshire, *Weeks v. Leighton*, 5 New Hampshire, 343. Vermont, *St. Albans v. Wilkins*, 8 Vermont, 54; 2 Ib. 79; 1, Ib. 268; 17 Ib. 355; 19 Ib. 503; *Kettle v. Harvy et al.*, 21 Ib. 301; *Jones v. Marsh*, 22 Ib. 144. Massachusetts, *Faxon v. Mansfield*, 2 Mass. 147; *Olmstead v. Beale*, 19 Pickg. 528; *Boyle v. Agawam Canal Co.*, 22 Ib. 381; *Davis v. Maxwell*, 12 Metc. 286; *Rice v. Dwight Manufacturing Co.*, 2 Cushing, 80. New York, *McMillan v. Vanderlip*, 12 John. 165; *Raymond v. Barnard*, 12 Ib. 274; *Jennings v. Camp*, 13 Ib. 94; *Ketcham v. Everton*, 13 Ib. 365; *Thorpe v. White*, 13 Ib. 53; *Clark v. Smith*, 14 Ib. 326; *Marsh v. Ruleson*, 1 Wendell, 514; *Champlin v. Rowley*, 18 Ib. 187; *Monell v. Burns*, 4 Denio, 121; 5 Denio, 406; *Gregory v. Marsh*, 3 Hill, 384; *McNight v. Dumlapp*, 4 Barb. 34; *Smith v. Brown*, 17 Ib. 431; *Oakley v. Morton*, 1 Kernan, 33, which case occurred since the New York Code was adopted. It not only establishes, that performance is not excused by inevitable necessity; but it establishes another proposition, equally conclusive of the erroneous action of the court, which is this, that, under an allegation

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of performance, the plaintiff can produce no proof in excuse of non-performance. Pennsylvania, *Shaw v. L. Turnpike Co.*, 3 Penrose & Watts, 445. Alabama, *Given v. Dairly*, 4 Alabama, 336; *Nesbitt v. Drew*, 17 Ib. 379. Mississippi, *Martin v. Reed*, 2 Smedes & Mar. 585. Ohio, *Witherow v. Witherow*, 16 Ohio, 238. Kentucky, *Hawks v. Griffin*, 14 B. Monroe, 153. Indiana, *DeCamp v. Stevens*, 4 Blackford, 24. Illinois, *Eldridge v. Rowe*, 2 Gilman, 91. Missouri, *Helm v. Wilson*, 4 Missouri, 41; *Feagan v. Meredith*, 4 Ib. 514; see, also, 2 Kent, 668.

Every case in relation to houses, barns, &c., which can be cited, where there was a recovery on a *quantum meruit*, was where the work was completed, but with a variation. Even the case of *Britton v. Turner*, which was a contract for wages, is not entirely against us. The court said, in that case, that "if on such failures to perform the whole, the nature of the contract be such, that the employee can reject what has been done, and refuse to receive any benefit from the part performance, he has the right so to do, and in such case is not liable to be charged?"

II. The charge asked by the plaintiff is erroneous, as follows: "That payment was to be made, in the absence of any contract, in the usual and customary manner." We rather suppose the usual rule will apply, that when one act was the consideration of the other, he who would recover, must first perform, or offer to perform, on his part. The plaintiff's second instruction is erroneous, because it assumes that the defendant has not denied the time and manner of payment. The defendant had denied both the time and manner of payment, and the assumption of the instruction, is erroneous, and tended to mislead the jury. The plaintiff's third instruction was erroneous, because the plaintiff in his pleadings, had averred a performance of the contract, and he could not give in evidence, or rely on an excuse for non-performance. See 1 Kernan, 33, already cited. The case in 3 Penn. 44, is a case directly in point; and the note in Chitty, cited on the other side, is erroneous.

III. The court erred by giving instructions directly in

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conflict. The court say, *Britton v. Turner* is law; and that the plaintiff could recover on a *quantum meruit*. The court gave the defendant's instructions on this point, which lay down the law just as directly opposite, as language can make them. The court say *Britton v. Turner* is law; and that 1 Kernan, 25; 22 Pick. 381; 2 Gilman, 91; 4 Missouri, 514, are law; and they directly conflict. Indeed, it is very difficult for instructions to be asked, more directly in conflict, and yet the court gave all that were asked on both sides, and added others, in favor of the plaintiff, which his attorneys, bold men as they are, did not ask, because they must have known they were not law.

IV. The court erred in refusing a new trial. There was no evidence to sustain the verdict; no law to sustain it. If the plaintiff could have recovered on a *quantum meruit*, still there should have been a new trial. The only evidence as to the value of the work, was the defendant's; that proved the whole work to be worth about \$428. The plaintiff had been paid \$425, and the jury gave \$569 more.

V. The court erred in refusing to arrest judgment, and in giving judgment. The verdict of the jury is mostly for damages. They do not find any contract. The charge of the court was, that there was no contract; the verdict cannot be construed to mean that there was, and no mechanics' lien can be granted on a *quantum meruit*. The verdict of the jury does not find that the work was done in pursuance of any contract, on any land. See Code, §§ 981, 985. A party cannot recover for a mechanics' lien on a *quantum meruit*. The petitioner is bound to prove his contract as laid, in order to entitle him to recover. He cannot abandon or depart from his special agreement, and go as upon a *quantum meruit*. *Carroll v. Cratne*, 4 Gilman, 566. The general features of the Illinois law and ours are the same.

Cook & Dillon, for the appellee.

This action was brought by Eyser, to recover a balance due him from the defendant, for work done upon, and materials furnished for, a certain building situated upon the

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land of the defendant. There is, as we maintain, no written contract between the parties. The defendant, it is true, attempts to dignify the paper attached to the petition marked "B," by the name of a contract; but it cannot be so regarded. It is without date; and standing by itself, it is impossible to say what it means, or what it was designed for; and contains no stipulation on the part of anybody, to do anything. It does not contain the first ingredient of a contract. It is nothing but what mechanics know by the designation of a "bill of prices" for work, &c.

Let us look at the pleadings to ascertain the issues. The plaintiff filed his original petition, and afterwards an amended petition. The "original" petition (so called to distinguish it), and the first section (or count) of the amended one, are in substance identical, and to which we wish to invoke the especial attention of the court. The petition does not declare upon the paper marked "B," as a contract; but after referring to that paper, it proceeds to state the contract as follows: "That what work petitioner should perform, and what material he should furnish, in and about said building, should be performed and furnished at the rates specified in said account; and that payment should be made for the same, as fast as such materials and labor should be so furnished and rendered," &c. This count nowhere alleges, that the plaintiff had agreed to do all the work mentioned in exhibit "B;" nor that he was bound to do any specific amount thereof; or that he had completed what he agreed to do; but says, he has done the work, &c., mentioned in exhibit "C," and is entitled to recover the balance due him thereon. The court, on motion (Code, § 1735), would doubtless have ruled the plaintiff to have set forth more specifically what amount of work, &c., he agreed to do, and when, and how, but it was not required by the defendant. The defendant answers: and the parties go to trial. There is no issue made here, that the plaintiff finished and completed the house, &c. We say, that all the evidence offered by the plaintiff, is relevant to this count, and fully justifies the verdict.

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In the second count, or section, of the amended petition, the plaintiff sets forth a subsequent agreement, &c., and that he finished the work. The appellant objects now, that there is a variance between the allegations in this count and the proof, in this: that the work was not finished. We reply to this: 1. By saying, that if either count in the petition, is supported by the proof, it is sufficient; 2. That he ought to have objected to this variance at the time, when the plaintiff could have amended his pleadings; and that he cannot now object to the testimony on that ground. We shall cite the authorities on this point, hereafter.

The third count (or section) in the amended petition, is in the nature of a *quantum meruit*. Code, § 1752; *Smith v. Congregational Church, &c.*, 8 Pick. 178. "Counts on a special contract, under seal, and a *quantum meruit*, may be joined in an action of debt." See, also, *Gibson v. Powell*, 5 Smedes & Mar. 712. An action of debt, or assumpsit, may be maintained, upon an implied promise for labor done, and materials found, under a special contract, which has not been performed on the part of the plaintiff." 8 Pick. 178.

Before we call the attention of the court to the authorities cited and read by Judge GRANT, we wish to premise, that the reports furnish us with two distinct classes of cases, so completely variant in the doctrines they assert upon this subject, as to defy all attempts to reconcile them. We will refer to these, although we maintain that these questions do not arise in the case under review, because: 1. We allege that a new contract was made; 2. That the defendant first violated the contract, by not paying as he agreed—in consequence of which, the plaintiff was justified in quitting the work, and can recover for what he had done previously. The one class of these cases decides, that where one party agrees to do a specific thing, and by a specific time, and in a specific manner, full and complete performance is a condition precedent to the right to recover anything. A fair specimen or type of this class, is the case of *Cutter, Adm'r v. Powell*, 6 T. R. 320. This is the case where a mate was to receive thirty guineas, in case he performed a certain

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voyage to Liverpool, and where he died during the voyage; and the court held, that nothing could be recovered, either on the contract, or on the *quantum meruit*. If this is law, it is a very hard one, and against conscience. Another of this class, is the one of *Sinclair v. Bowles*, 9 Barn. & Cress. 92. In the United States, the case of *McMillan v. Vanderlip*, 12 Johns. 165, follows the same doctrine. This is the case where A. agreed to work for B. ten and a half months, and spin yarn at three cents per run; and brought an action (having quit the service before the expiration of the time), for 845 runs, at three cents per run: held, that nothing could be recovered.

The other class of cases, conflicting with that class above cited, and irreconcilable with them, have their type, so to speak, in the cases of *Cooke v. Munstone*, 4 Bos. & Pull. 351, 355; *Shipton v. Casson*, 5 Barn. & Cres. 378; *Oxendale v. Wetherill*, 9 Barn. & Cres. 386. In this last case, Lord TENTERDEN observed, that it would "follow from the doctrine contended for, that if there had been a contract for 250 bushels of wheat, and 249 had been delivered to, and retained by, the defendant, the vendor could never recover for the 249, because he had not delivered the whole." We ask the particular attention of the court, to the note to pages 218 and 219 of Sedgwick on Damages, where he cites many cases to show, that in many instances, and particularly in building contracts, precise and full performance is not, in all cases, absolutely necessary to recover at all; but it is a matter affecting the amount, more than the right, of recovery, in actions like the one at bar.

We now wish to make one general remark, in reference to the argument and authorities of the counsel for the appellant, and it is this, that both the argument and authorities assume, that the plaintiff abandoned the contract, and refused to complete it. This we deny. The plaintiff did not abandon the work. He did not violate the contract. But the defendant first broke the contract, by not making payment as he agreed to do; wherefore the plaintiff was under no obligation to finish the work, and can recover for

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what he did perform. The evidence, and the verdict of the jury, show, that the plaintiff, over and above payments, did work, and furnished materials, to an amount of over \$500, which the defendant used and appropriated for his own benefit.

What is the pretext now urged, for not paying the plaintiff? It is (and this, in fact, constitutes the basis of all the errors assigned), that the plaintiff has stated in his petition, that he agreed to complete the work, and inasmuch as he has not proved that he completed all the work, he cannot recover anything. In the original petition, and in the first section (or count) of the amended petition, the plaintiff has made no averment that he agreed to do all the work, &c., mentioned in the schedule of prices attached to the petition. These counts tender no issue of performance of all the work specified in the "bill of prices." The appellant now contends, that the judgment of the court below ought to be reversed, because the evidence did not warrant the jury in rendering a verdict for the plaintiff, inasmuch as such evidence does not show a full performance on his part. We apprehend that this objection comes too late. The ground taken is, that there is a variance between the proof and the evidence. Very well. What was his proper course? It was, either to have objected to its admission, because of its variance from the allegations, and then, if the court below had ruled such evidence in, he could have excepted, and preserved the question. Or, if, when the proof was all in, it did not correspond with, and was materially variant from, the allegations and issues made, then, it was his duty to have moved the court to exclude the evidence; and in case of a refusal to do so, he could except, and thereby save the question for review in this court. A party cannot sit by, suffer testimony to go into a jury, and, after verdict and judgment, object that there is a variance between the proof and the pleadings. He must object at the time. 8 Scam. 129; 3 Gill, 535.

It is not necessary for us to cite and review, all, or even any, of the cases referred to by the counsel for the appellant.

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They are all, both English and American, cases where there was a definite and special contract between the parties, and where the plaintiffs in those cases had, without any reason, abandoned the contract, and refused to perform it, and then brought suit on a partial performance. These cases may, or may not, be law, but they do not apply to the present case, because the evidence shows, that the defendant first failed to keep his part of the contract, and which exempts the plaintiff from further proceeding with his work. Chitty on Contracts (6th ed.), 570, note 2.

We do not rest this case, on the doctrine laid down in *Britton v. Turner*, 6 N. H. 497, nor is the doctrine there laid down, necessarily involved in this case, so that this court is not called on either to sanction, or repudiate it. In Buller's *Nisi Prius*, 139, it is laid down as a general proposition, "that if a man declare upon a special contract, and upon a *quantum meruit*, and prove the work done, but not according to the contract, he can recover on the *quantum meruit*." See *Cooke v. Munstone*, 4 Bos. & Pull. 351; *Shipton v. Casson*, 5 Barn. & Cres. 378; *Oxendale v. Wetherill*, 9 Ib. 386; *Linningdale v. Livingston*, 10 Johns. 36; *Jewell v. Scopell*, 4 Cowen, 564; *Pelter v. Seiwall*, 12 Wend. 386; *Davis v. Fish*, 1 G. Greene, 407; *Cruikshank v. Mallory*, 2 G. Greene, 257; *Du Bois v. Delavan*, 4 Wend. 290; *Merrick v. Slason*, 19 Vermont, 127.

We take this further position, that there is nothing in this case, which this court, as a court of errors, can take cognizance of, for the reason that the appellant's exception, both to the plaintiff's instructions, and to the charge of the court (which is lengthy, and involving several propositions), is a general and indiscriminate exception, without any specification whatever. The bill of exceptions, after setting out the testimony (to the admission of which, by the way, the appellant never objected), and the whole charge of the court, and all of the plaintiff's instructions, says: "To all of which instructions of the court, as well those given by the court, as those given at the request of the plaintiff, the defendant then and there excepted, and prays, &c." This brings

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this case precisely within the operation of the rule laid down in *Caldwell v. Murphy*, 1 Kernan, 416; 5 Denio, 213; 2 Selden, 233. "Where the charge of the court involves several propositions, and as to some of them it is unobjectionable, an exception taken at the conclusion, to each and every part of the charge, presents no question for review on a bill of exceptions."

WRIGHT, C. J.—To reverse this judgment, defendant relies in his assignment of errors, upon sixteen different grounds, the most material of which we proceed to notice; and we may say at once, that we think a large portion of the instructions are entirely inapplicable to the case. Such we have examined carefully, and while we thus regard them foreign, yet we are unable to see that the jury could reasonably have been misled thereby, and it therefore, will be unnecessary to further refer to them. Of this character, is all that is said in the instructions in chief, as to the law where there have been deviations from the original plan agreed upon by parties, or where there has been extra work. We do not see any testimony tending to raise these questions, and are unable to see their applicability in any way, to the case. The same is true of the plaintiff's and defendant's instructions relative to the fall of the building, for we do not understand that either party claims, that the plaintiff's right to recover, or the defendant's liability, is increased or diminished by that circumstance. Where it is evident that such foreign or inapplicable instructions, could reasonably have misled the jury, to the appellant's prejudice, this court will reverse the case, and order a new trial. But not so, where the prejudice is not manifest. This disposes of the second and seventh assignment of error.

The court below charged the jury, that the decisions predicated on written contracts, were not applicable to the case at bar, "as no written contract had been established or produced, showing the nature of the undertaking of the parties, or their several liabilities in the premises," and this is claimed to have been error, both of fact and law. We think

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this instruction was substantially correct. The point of the instruction, as we understand, and that to which the objection is made, is that the jury are told that there was no written agreement between the parties. It is the duty of a court to determine, and to inform the jury, whether a paper or writing introduced is, or is not, a contract—is or is not, that which fixes the liability in the premises. This paper had not the first ingredient of a contract. By it, no person could learn where, when, or how, the work was to be done; who was to do it; who was the employer, or employee; what the terms of payment; when it was made, or whether it had the most remote relation to the building erected. It states neither parties, object, nor subject matter. There is, in short, neither agreement, consideration, or a thing to be done or omitted; and the jury were, therefore, properly informed, that no written contract had been introduced, showing the undertaking or several liabilities of the parties. When taken in connection with the pleadings and oral testimony, we understand it to be, a statement of the prices that defendant was to pay for certain materials and labor to be furnished and performed by plaintiff, and nothing more. If, however, the pleadings and proof shall, in connection with this paper, show a contract, then it must be governed by the same rules, and the parties be subject to the same liability thereunder, as if it was written, whether that contract shall be entire or several—certain, dependent, or independent covenants—be executed or executory—or whatever its conditions. And this brings us to an examination of the plaintiff's petition, the great mass of the instructions, and indeed the points in the case upon which counsel have bestowed much labor and research, and upon which appellant chiefly relies, to reverse this judgment.

On the trial, the jury were properly told, that whether there was any contract, and if so, its nature and conditions, and whether it had, or had not, been performed, were to be determined by them, from the evidence. The court also instructed the jury, "that where a contract is made of such a character, that a party actually receives labor and materials,

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and thereby derives a benefit, over and above the damages, which have resulted from the breach of the contract by the other party, the labor actually done, and the value received, furnish a new consideration, and the law, therefore, raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case,—one not within the original agreement,—and the party is entitled to recover on his new case, for the work done, not as agreed, yet accepted by the defendant. If, on such failure to perform the whole, the nature of the contract be such, that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled so to do; and in such case is not liable to be charged, unless he has before assented to, and accepted what has been done. But where the party receives value, takes and uses the materials, or has advantages from the labor, he is liable to pay the reasonable worth of what he has received. The amount, however, which the employer ought to be charged, when the laborer abandons the contract, is only the reasonable worth, on the amount of advantage he receives upon the whole transaction, and in estimating the value of the labor, the contract price for the service cannot be exceeded," citing *Britton v. Turner*, 6 N. H. 497; *Fenton v. Clark*, 11 Vermont, 560; 12 Ib. 625; and further, that "the principle here adopted, is that it is unconscionable and inequitable, for a party who has been actually benefited by the part performance of a contract, above or beyond the damages he has sustained, by the non-performance of the residue of the agreement, to retain this excess of benefit, without making the other party a compensation therefor." And after having laid down these rules, in the instructions in chief, the court, at the request of defendant, gave the following:

1. That the plaintiff in this cause, having brought this action on a special contract, and averred a performance of the contract, cannot recover at all, unless he proves the performance thereof, as alleged.

2. If a person contract to build a house, or to do the wood

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work, and furnish the raw materials for a house on the land of another, and proceeds to perform the work, in part, and afterwards refuses and neglects to complete the residue according to the terms of the agreement, and it is impracticable for the employer to abandon it, he can appropriate the work so far as it may have progressed, without being subject to an action for what the work is worth," citing *Boyle v. Agawam Canal Co.*, 22 Pick. 381; *Oakley v. Martin*, 1 Kernan, 25.

8. "That under no proof which plaintiff might offer, short of performance of all the work, and furnishing all the materials agreed upon, can the plaintiff recover in this action.

18. "That if plaintiff abandoned the work before he completed his contract, and refused to complete it, or permit others to complete it, he cannot recover in this action."

And, in addition to these, the court gave some eight other instructions, at defendant's request, equally as explicit, and laying down the doctrine quite as strong, that plaintiff could not recover upon an entire contract (on this contract, see 8th instruction), without proof of entire performance. The instructions in chief, and those given as asked by defendant, cannot all be law. There is an irreconcilable conflict between them; and we may be permitted to express our surprise, that, after having given the one, the court should have given the other. And, in this connection, we will dispose of the appellant's assignment of error, based upon this very conflict. Nothing tends so much to certainty in judicial proceedings, or is more likely to insure the correct administration of the law in our courts, than clearness in the instructions given to the jury. These should, ordinarily, be brief—enunciating, with perspicuity, the very principles that apply, and upon which the case should be decided—lopping off all extraneous matter. Any other course must necessarily confuse a jury, and endanger the rights of parties; and yet we are aware, that, in cases strongly contested, it requires great care to do this. The counsel will prepare lengthy instructions; a portion being correct and applicable, perhaps; others, abstractly correct, but entirely foreign to the case; and in the haste incident to such trials, all are given. We

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regret to see that this is a growing evil, and the remedy lies almost exclusively in the hands of the judge, who should make it a cardinal point, to have practical certainty in the trials had before him, even if he shall not arrive at theoretical perfection. In the case before us, the difficulty can hardly be said to be one of confused instructions, but the giving of those that do plainly and manifestly conflict. The jury could well understand, that the law was either as laid down by the court, or as asked by defendant, and given; but which, it must be conceded, the jury could not tell, from the instructions. Where instructions are so confused, that we can see that the jury were misled, and instead of deciding the case upon the questions involved, acted at random, to the probable prejudice of the complaining party, we should not hesitate to order a new trial. When the complaining party has, however, asked and obtained instructions which conflict with those given in chief, we do not think it would be a safe or salutary rule, to reverse a case for that reason. If his instructions are right, then the others are wrong, and for that reason the case should be reversed. If his are wrong, and, notwithstanding their strong and explicit language, it should appear that the jury decided the case correctly, under all the circumstances, then the judgment should not be disturbed.

We, therefore, are left to determine, which of these instructions are correct, and which erroneous. It is very manifest, that if the jury had followed the law, as laid down in defendant's instructions, they never could have found this verdict, while, if they followed the other ruling, they reasonably might. Before examining these instructions, it will be necessary, to refer with a little more care, to plaintiff's petition. And, briefly, we understand the second count to declare upon a special, entire contract, and to aver a fulfillment thereof. The first count, we understand to declare upon a special, but not an entire contract. It avers, in substance, that for certain prices named in the bill or statement signed by the parties, the plaintiff was to furnish materials, and do work on a house, described and located, and for

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what he did furnish and perform, he was to be paid at the rates therein specified, as said materials and labor were furnished and rendered; that he did furnish materials and perform work under said contract, to an amount shown in the account annexed; and that there remains due and unpaid, the amount claimed; but there is no averment, that he either was to, or did, furnish all the materials, and complete the house. And yet it is quite evident, that, in both counts, plaintiff seeks to recover specially upon an alleged special contract, and does not declare generally on the assumpsit which the law implies. In other words, he places his right of action, in each case, upon an express contract, and not upon the implied legal liability of the defendant, to pay or recompense him for materials furnished and work performed, at his request.

Having then declared specially, with nothing in the nature of the common counts, can he recover what the materials and services were reasonably worth, as in general assumpsit? We think not. We are aware that courts have had much difficulty, in solving the many questions that constantly arise in actions brought to recover on special contracts, where there has been a partial performance—where there have been deviations from the original contract—where there has been an abandonment of the work to be performed, with and without the consent of the employer—and where the contract has not been performed, and the employee seeks to recover what his work or services are reasonably worth. We know of no case, however, which has gone so far as to hold, that a party may declare specially, and yet recover as upon the common counts. In all the cases in which it has been held, that a party may recover for the reasonable value of his services rendered upon a special contract, it will be found, that he claimed under the common counts alone, or else had the special, as well as the common counts, in his declaration. This is abundantly shown in the case of *Britton v. Turner*, 6 N. H. 481, relied upon by appellee, as also in *Haymond & Leonard*, 7 Pick. 181; *Epperty v. Bailey*, 3 Ind. 73; *Pierson v. McKebbin*, 5

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Ind. 261; *Coe v. Smith*, 4 Ib. 79; and, indeed, in all that class of cases which hold, that the contractor may recover a reasonable sum for the services he has actually performed, though he has failed to complete the contract in all its parts. If he declares alone upon the special contract, he cannot recover, because the work or service which was to entitle him to the amount agreed upon, has never been performed, and therefore, the proof fails to sustain the material averments in the petition. If he declares upon the common counts, however, he relies not upon any special or express promise, but upon the implied obligation which the law imposes on the defendant, to pay what the services are reasonably worth, deducting therefrom whatever damages he has sustained, by reason of the non-fulfillment of the contract. In this case, we do not determine the much disputed question, whether the plaintiff could recover upon the common counts, what the materials furnished, and labor performed, were reasonably worth, if he abandoned the contract. On this subject, the authorities are very complicated, and not to be reconciled. We may say, however, that a majority of the court, which heard the argument, incline strongly to the opinion, that upon a proper declaration, the action might be maintained. As the record does not, however, raise the question, we do not pass upon it.

In this view of the petition, the instructions in chief are erroneous. They are evidently based upon the doctrines recognized in *Britton v. Turner*, 6 N. H. 841, and there, as already shown, the declaration contained the common counts. Here there are no common counts, and there could, therefore, be no recovery, except upon the promise set out in the special counts. If the jury found that the contract was proved and performed, as set forth in either count, then, of course, these instructions were immaterial, and could not have prejudiced the defendant. And was it manifest from the proof, that plaintiff did in fact fulfill his contract, and was entitled to recover the full contract price, we should not incline to disturb the verdict. But so far from this being manifest, it quite clearly appears, that the work was

abandoned by plaintiff. And yet, while the jury may have believed this, under these instructions they were justified in finding whatever the plaintiff's materials and services were worth, over and above the damages which resulted to defendant from the breach of the contract. This, we think, could not be done under the petition. The first count, as already stated, is not upon an entire contract. Neither is it of that class of cases which we sometimes see, where the materials, work, time, and manner of performance, are all contained in a special contract, but the price to be paid is left unsettled or undetermined. In such a case, it would be manifestly proper to set forth the contract, and claim to recover whatever the services and materials were reasonably worth. But, in this case, while, by the first count, plaintiff does not declare upon an entire contract, yet he does allege and claim, that the prices to be paid, as well as the materials and work, were fixed and determined by his agreement or contract with the defendant; and, having so declared, we think, he cannot abandon the same, without other averments, and recover upon an implied obligation. And this view applies, with much more force, to the second count, for there there is an express averment, that plaintiff was to, and did, fulfill a contract entire in its character.

The plaintiff, however, insists that certain averments made in the concluding part of the second count, entitled him to recover as in general assumpsit. Without referring to these averments in detail, we conclude that we should permit too loose a system of pleading, to so treat them. If this part of the count, had the substance, we should not be inclined to hesitate as to the form. It appears to have been thrown in without any very definite object, and as such, may properly be disregarded.

It is further claimed by plaintiff, that we cannot, as a court of errors, inquire into the correctness of the instructions, because the exceptions thereto are too general and indiscriminate. The bill of exceptions sets out all the testimony, the entire charge of the court, as well as the instructions asked by plaintiff, and concludes as follows: "To all which in-

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structions of the court, as well those given by the court, as those given at the request of the plaintiff, the defendant then and there excepted, and prayed," &c. The point now made is, that inasmuch as the charge of the court, and the instructions asked by the plaintiff, involve several propositions, if some of them are unobjectionable, then a general exception will present no question which can be reviewed in this court. The plaintiff relies to sustain this position, principally upon the New York cases, citing *Caldwell v. Murphy*, 1 Kernan, 416; *Hart v. Railroad Co.*, 4 Seld. 43, and others, as also the decisions from some other states. Without examining in detail these cases, we may say that many of them, are not analogous to the one at bar, while others, were made under a system of practice quite different from ours. Under our Code, the charge of the court is to be confined strictly to matters of law, and if desired by either party, must be in writing, and placed in the hands of the jury. So also, the instructions asked by either party, shall be in writing, if required by the court. To any decision or opinion, either party may except, which is done (if for matters occurring during the trial), by reducing the same to writing, before the verdict is rendered, unless otherwise arranged by consent. When reduced to writing, and signed by the judge, the bill of exceptions becomes a part of the record. And thus we see, that under our practice, all the instructions may become part of the record in a case, as fully and entirely as any other portion of it. To make them so, however, as this court has frequently held, it is necessary that the party objecting, shall have the same incorporated into a bill of exceptions. When he has done this, we see no warrant under our statute, for saying that the errors will be disregarded by this court, if a portion of the instructions should be unobjectionable. The hardship and difficulty of which the plaintiff speaks, we think, might be easily obviated by attention on the part of the court and opposite counsel, to the bill of exceptions. We coincide, most freely, in the position, that this court should only pass upon the very matters which were determined by the court below, and that a party should not be surprised by

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having to meet a new issue in the appellate tribunal; and with reference to the instructions, this may be easily accomplished. Take this case as an illustration. After the instructions were given, the defendant stated, as we may suppose, that he excepted to the same. Then it was in the power of the court, to require that he should specify to what particular proposition or propositions involved in the charge, he wished to take his exceptions. And if the court did not exercise this power, the opposite party might have required it; and thus, in one way or the other, might have been brought to the attention of the court, the objectionable matter contained in the charge, and an opportunity given to correct the same, if desired. If it appeared that when thus required, the defendant refused to point out the particular parts to which he objected, there would be great force in the position, that this court should not reverse, if any part of the instructions were unobjectionable. This practice strikes us as fair and equitable, and in accordance with the spirit of the Code. In this method, we may, at least, approximate having only those questions revised in this court, which were contested by the parties in the court below. When, however, the exception is general to the whole charge, and not objected to, by the opposite party, or required to be specified by the court, we think the appellant may assign his errors here, so as to obtain a review of any part of such instructions. There is another consideration that has much weight with us, in determining this question. The course pursued in this case, by appellant, in excepting to the charge of the court as a whole, is that uniformly followed, and in the absence of some positive, statutory requirement, we should be unwilling to enunciate a rule that might, and probably would, result in affirming a large proportion of the cases before us, which have been prepared in strict accordance with the uniform practice. By pursuing the course indicated herein, we think all the difficulties suggested by plaintiff, may be prevented, and much injustice to parties, and labor to this court, obviated. We conclude, therefore, that the bill of exceptions does properly present the objec-

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tions urged by defendant; that the instructions given by the court were erroneous, as applied to the case made by the plaintiff's petition; and that the judgment must be reversed.

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Where, in the Supreme Court, the appellee moved to dismiss the appeal, and affirm the judgment, for the reason, that the transcript contained no bill of exceptions, to show the error complained of in the proceedings and judgment of the court below; *Held*, That the fact that there was no bill of exceptions, did not necessarily preclude the possibility that there was error in the record, not necessary to be shown by a bill of exceptions, and the motion was overruled.

A bill of exceptions makes that a part of the record, which, without it, would not be. If the error appears without it, there need be no bill of exceptions.

The action for a mechanic's lien, is not a proceeding against the property.

And where in an action to establish a mechanic's lien for the erection of a house on certain real estate, the petition alleged that the contract was made with W. acting for himself and the other defendants, the latter being the owners of the lot; and where W. failed to answer, and the other defendants answered, that they were the exclusive owners of the lot; that W. had no interest in it, and this fact was well known to plaintiff, at the time he made the contract with W.; and that W., if he made any such contract, acted without their knowledge or consent, and did not make the contract in their behalf, to which answer there was no replication; and where no evidence was introduced, and the cause was submitted to the court on the pleadings, and the court found the issues for the plaintiff, and rendered judgment against the house; *Held*, That the judgment was unauthorized by law.

Appeal from the Dubuque District Court.

THIS was a petition for a mechanic's lien. The petition claims of the defendants, three hundred and fifty dollars, for work done and materials furnished in building a house on part of lot 480 in Dubuque, and prays that the judgment may be established and declared a mechanic's lien upon the premises, or upon the house built and completed on the same by the plaintiff, or on both, as the court shall deem just. Williamson, though served with notice, failed to ap-

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pear and answer; but there was no judgment against him by default. The other defendants, Volney White, Harriet White, Lucia White, Sarah Ann White, Gay White, and Lycurgus White, appeared and answered.

The petition alleges, that the contract was made by Williamson, acting for himself and the Whites, the latter being the owners of the lot 430. The Whites answer, that they are the exclusive owners of the lot; that Williamson had no interest in it, and that this fact was well known to plaintiff, at the time he made the contract with Williamson, for the erection of the house; that Williamson, if he made any such contract, as is set up in the petition, acted without their knowledge or consent, and did not make the contract in their behalf; thereby negating the averments of the petition. The defendants submit the question to the court, whether their property can be affected by Williamson's acts, and pray that the petition be dismissed as to them, and so far as any lien is sought to be established against their property.

To this answer of the defendants, the Whites, there is no replication. No evidence was introduced; the cause was submitted to the court, on the pleadings, and upon such submission, as appears from the record, "the court found the issue for the plaintiff, and adjudged, that the plaintiff have judgment for his amount claimed, with interest, against the house mentioned in plaintiff's petition."

Wilse & Blatchly, for the appellants.

Nightengale & Wilson, for the appellee.

STOCKTON, J.—The plaintiff moves this court to dismiss the appeal, and affirm the judgment in this cause, for the reason that the transcript contains no bill of exceptions, to show the error complained of in the judgment or proceedings of the District Court. This motion cannot be granted, as a matter of course. The fact that there is no bill of exceptions here, to show the error complained of, does not necessarily preclude the possibility that there may be error in the record,

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not necessary to be shown by a bill of exceptions, which may call for the interposition of this court. The bill of exceptions makes that a part of the record, which was not so before. If the error appears without it, there is no necessity for it. If, in this cause, the question which the appellants wish to present, for the consideration of this court, appears in the record of the proceedings of the District Court, it will be proper to consider it, though the same may not be presented in the shape of a bill of exceptions. The object of the bill of exceptions, is, to put the question of law on record, for the information of the court of error, having cognizance of the cause. Tom. Law Dic.

The counsel for the defendants, assign for error in the judgment of the District Court, that such judgment should not have been rendered against the house described in the petition; that the same was not authorized by law, under the state of facts developed by the pleadings; nor was the same authorized against a house, where the contract to build was not made with the owner of the lot on which it was situated. The important question for our consideration is, whether the judgment was properly entered against the house situated on lot No. 430. The action for a mechanic's lien, is not a proceeding against the property. It must be commenced as in ordinary actions upon account. It must be against some person by name, as defendant, and can only be by virtue of a contract with the owner of the land. The judgment, likewise, must be rendered against some person as defendant, and cannot be against the land alone. If there has been no contract with the owner of the land, no lien can attach by virtue of the labor done, or materials furnished, in the erection of a house upon it. The amount of interest held by such owner, does not seem to be material. The lien, however, will attach only to such interest. It extends to the whole of his estate or interest, and no farther. Code, §§ 981, 982.

The petition in this case, does not allege that Williamson, who made the contract, had any interest in the lot. It appears, on the contrary, that it was known to plaintiff that the

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Whites were the owners of the legal title. It does not allege that the contract for the work or materials, was made by the Whites; it appears, on the contrary, that it was made with Williamson alone. The petition avers that Williamson, in making the contract, was acting for himself, as well as for the Whites; but in what capacity he was acting for them, whether as agent or otherwise, is not shown. The answer of the Whites denies his agency or authority, and denies all knowledge or consent by them, as to the acts of Williamson.

It appears to us that the plaintiff failed entirely to make out his case, as alleged in his petition. Under the state of facts appearing in the record, we are of opinion, that there could have been no judgment for a lien properly rendered against Williamson; because, although he made the contract, he was not the owner of the lot, and had no interest in it. There could have been no judgment properly rendered against the Whites; because, although they were the owners of the lot, they had, in no sense, made the contract with plaintiff, for the labor and material, and had not in any manner assented to it. The District Court, however, seems to have been of opinion, that the plaintiff was entitled to a judgment for the value of his labor and materials; and as it could not be rendered against the defendants, nor any of them, that it ought to be rendered against the building he had erected on the lot. Such a judgment, to say the least of it, is rather unusual. In a proceeding for a mechanic's lien, where there are several defendants, and especially where, as in this case, their interests are diverse, the plaintiff, on proper proof, may be entitled to a judgment against one or more of them, although he has sued as upon a joint contract. In such case, however, the other defendants are entitled to a judgment in their favor, and as to them the suit should be dismissed. In the present case, the court does not ascertain against whom, if against any of the defendants, the plaintiff is entitled to recover. It does not determine as to whom the suit should be dismissed. But, without adjudicating either of these questions, it renders a judg-

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ment against "the house." It is needless for us to say, that in this suit the house was not the defendant. The court could not avoid the duty of adjudicating between the plaintiff and the defendants, upon the case presented in the record, by turning aside to render a judgment against some person or thing, not a party to the suit. The judgment is, in our opinion, unauthorized by law. The house, as distinct from the ground on which it stands, is not the subject of a judgment, even if this were an action solely *in rem*. It is as much the property of the Whites, as the lot. It is part of the realty, and cannot be separated from it. Having been erected on their premises, without their consent, the plaintiff, unless he can connect the Whites with the transaction, and render them liable, must rely on his contract with Williamson, and seek his remedy against him. It is only by showing that the Whites were liable, by contract, to pay for the work and materials, that a lien can be established against the lot. For the reasons above given, the judgment of the District Court is reversed, and the cause remanded.

BLAKE v. CITY OF DUBUQUE.

Where, in an action on a contract, in which the plaintiff agreed that he would do the necessary filling and cutting to reduce and elevate the present actual surface of that part of Mineral street, in the city of Dubuque, &c., to a surface which shall correspond with a certain grade, the work to be done under the supervision and direction of the city engineer or the street commissioner, for which the city was to pay a specified price; and the court instructed the jury, that as the contract provided that the work should be done under the supervision and direction of the city engineer or street commissioner, and that the plaintiff should be paid under the estimates of the city engineer, if the work was done under the direction of either of these officers, the plaintiff was entitled to receive pay according to the estimates of the city engineer, unless it be shown that the estimates are incorrect; that the jury have a right to examine these estimates, and if they should be found to be based upon any mistake of fact, or any erroneous principle of engineering, they may be set aside; and that if the estimate of the en-

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gineer is the proper one, they may adopt it; and where the defendant asked the court to instruct the jury, that they will not allow for any excavation below the authorized grade as fixed by the contract, which the court refused, and held, that if the excavation was done under the direction of the city engineer or street commissioner, it might properly be considered by the jury; *Held*, 1. That the contract was substantially a contract to make the street of a certain grade, in the best manner, under the direction of the officers; and, 2. That the court did not err in giving or refusing the instructions.

Appeal from the Dubuque District Court.

THIS is an action, brought by the plaintiff, to recover compensation claimed for work done under a contract for grading a part of Mineral street, in Dubuque. There is a written contract between the parties. By this, Blake "covenants that he will do the necessary cutting and filling, to reduce and elevate the present actual surface of that part of Mineral street, &c., to a surface which shall correspond and agree with the line in red ink upon said profile marked grade"—there being estimated to be 275 feet of cutting, and 275 feet of filling, linear measurement, more or less." In the above part of the contract, is a description of the part of the street to be graded, and a reference to a map and profile, with a mark to indicate the grade. Blake is also to do certain paving, and construct certain walls for bridges; but no question arises on these. "All the work contracted to be done by the said John Blake, as aforesaid, is to be done under the supervision and direction of the city engineer, or the street commissioner." On the other hand, the city agrees to pay for the work to be done, as aforesaid, "according to the following terms, to wit: for the cutting and filling aforesaid, at the rate of fifty cents for each cubic yard of earth and rock excavated, and removed and deposited in the place hereinbefore designated, or which may be hereafter designated by the city engineer or street commissioner." Payments were to be made from time to time, as the work progressed, but twenty-five per cent. might be retained till the completion and acceptance of the work. "The earth and rock removed in cutting, or as much thereof as may be re-

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quisite, are to be employed in the filling aforesaid, and in paving and constructing the walls of the bridges." There is no designation, other than this, where the earth and rock are to be deposited.

The city admits the contract, but holds that plaintiff claims for more work than he is entitled to receive pay for. This is the gist of the controversy, and to arrive at an understanding of the question, it is necessary to look into the testimony, which is given in the bill of exceptions. But this is the only ground upon which we can look at it. James Potter says, he was the city engineer; that the excavation was in thick layers of rock, shelving upward, and it was oftentimes necessary, in blasting down to the grade, to take out a thick layer reaching several feet below it. The road was then filled up to the established grade, which I allowed in my estimates. The work was done under my supervision, and that of the street commissioner. I directed the road excavated below the grade in some places, to be filled up with clay excavated, to the level fixed for the road. There is testimony to show, that one Blocklinger was street commissioner, and often had the oversight of the work; that he was frequently present when layers of rock were being removed to a depth below the grade, and when the holes and vacant places thus made, were filled up; and one witness testifies, that Blocklinger directed the removal of a layer of rock in the road, which extended some feet below the grade. I. N. Higbee made an estimate of the work, agreeing sufficiently nearly with Potter's, except that the former allowed for no excavation below the established grade. This makes a difference of \$305, which is the subject of dispute. Blocklinger testifies, that he did not direct Blake, or his workmen, to excavate below the grade. Different payments were made during the progress of the work, which were allowed by the jury. The court instructed the jury: "That as the contract provides that the work should be done under the supervision and direction of the city engineer, or street commissioner, and that Blake shall be paid under the estimates of the city engineer, if the work was

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done under the direction of either of these, the plaintiff is entitled to receive according to the estimates of the engineer, unless it be shown that the estimates are incorrect; and that the jury have a right to examine these estimates, and if they should be found to be based upon any mistake of fact, or any erroneous principle of engineering, they may be set aside; and if the estimate of the engineer, is the proper one, they may adopt the latter."

The defendant requested the court to give the following instruction: "The jury will not allow for any excavation below the authorized grade, as fixed by the contract," which the court refused, and held that if the excavation was done under the direction of the city engineer or the street commissioner, it might properly be considered by the jury. There was a motion for a new trial, based upon a supposed error in the foregoing instructions and refusal, which was overruled. The errors assigned in this court are: *First*, in refusing to give the instructions asked by the defendant. *Second*, in permitting the jury to take into consideration the excavation below the grade, as fixed by the contract. *Third*, in overruling the motion for a new trial.

Wiltse & Blatchly, for the appellant.

Burt & Barker, for the appellee.

WOODWARD, J.—We do not think there is error in the instruction, and refusal of the court. The matter rests upon the original contract, and not upon any promise made by the officers. And the terms of the contract, do not necessarily confine his measurement to the precise grade. Those terms are somewhat general, and the work is placed under the direction of the engineer and commissioner, both which circumstances, indicate an adaptation of the contract to the character of the work, it being in rocky soil; and, therefore, not to be simply cut and filled to a certain grade, but rocks were to be blasted and excavated, and those running in unforeseen directions, and with uncertain' declinations, thus

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requiring the execution of the work to be directed by sound judgment, according to varying circumstances. In accordance with this idea, we find it necessary (as the engineer testifies), to blast and excavate below the required surface. And this is entirely conceivable. Accordingly, the terms of the contract, are, that Blake is to do the *necessary* cutting and filling, to reduce and elevate the street to a certain grade.

This is the light in which the contract appears to our minds, and it does not seem to be one, requiring the contractor either to cut the rocks at the specific grade, or to blast lower, and then fill at his own expense. It is substantially a contract to make the street of a certain grade, in the best manner, under the direction of the officers.

Judgment affirmed.

 COWLES *et al.* v. SHAW *et al.*

An injunction should not issue in an ordinary case of trespass.

Where a complainant's bill contains no equity, the defect is fatal, even on final hearing, or in the appellate court.

Where the defendants in an action of trespass, which is being continued, are entirely insolvent; or where the trespass has or may become a nuisance, or amounts to waste; or where numberless suits may have to be brought to make the remedy complete; or where the trespass is by a party occupying a fiduciary relation; or where the injury is of such a character that the loss would be irreparable, and not to be compensated by damages; an injunction to restrain the commission of the trespass, may properly issue.

Where in an action of trespass for cutting timber, the petition averred that the defendants were continuing the trespass, with a view of carrying the timber away, and further alleged as follows: "Your petitioners believe and further represent, that the said defendants intend and assert, and if not restrained, will take and carry away said cord wood (the timber so as aforesaid cut down), from said premises, and so dispose of the same, as to put it beyond the reach of your petitioners. Your petitioners further represent, that if the defendants are notified of this application, they will remove said cord wood, before an injunction can be served upon them. For all which said trespasses, the said plaintiffs ask judgment in treble damages, and pray that an in-

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junction may be allowed to restrain said defendants from committing any further trespass on said land, and from moving said cord wood therefrom," upon which petition an injunction issued; and where the defendants moved to dissolve the injunction, and at a subsequent term, under a rule to answer within a given day, demurred to the said petition, because the plaintiffs had an adequate remedy at law, which motion and demurrer were overruled; and where, the defendants refusing to answer further, the bill was taken as confessed, and the injunction was thereupon made perpetual; *Held*, That both the motion and demurrer should have been sustained.

Appeal from the Des Moines District Court.

THE plaintiffs filed their petition, claiming of defendants a certain sum for alleged trespasses in cutting down timber on plaintiff's real estate, and avering also, that said defendants were continuing to cut down the same, with the view of carrying the same away, and disposing thereof, for their own use. So much of the petition as is material to determine this case, is as follows: "Your petitioners believe and further represent, that said defendants intend and assert, and if not restrained, will take and carry away said cord wood (the timber so as aforesaid cut down), from said premises, and dispose of the same, so as to put it beyond the reach of your petitioners. Your petitioners further represent, that if the defendants are notified of this application, they will remove said cord wood, before an injunction can be served on them. For all which said trespasses, the said plaintiffs ask judgment in treble damages, and pray that an injunction may be allowed to restrain said defendants from committing any further trespasses on said land, and from moving said cord wood therefrom."

An injunction was ordered, and writ issued. Defendants afterwards, at the same term at which the injunction was granted, moved to dissolve the injunction, which motion was overruled. At the next term, the defendants, on their motion, were allowed to a certain day in vacation, to file their answer to plaintiffs' bill. Under this order, defendants demurred to the bill, for the following reasons: 1st. Because it joined two distinct causes of action; and, 2d. Be-

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cause plaintiffs had a plain, speedy, and adequate remedy at law. At the next term, this demurrer was overruled, and defendants "failing to further plead, answer, or demur (but abiding by their demurrer), the bill was taken as confessed and true, and the defendants perpetually enjoined from cutting or removing timber on or from the premises described. No judgment was rendered for the alleged trespass, nor does anything appear to have been done with that part of the case. From the order of the court overruling the motion to dissolve and the demurrer, and granting a perpetual injunction, the defendants appeal.

J. C. Hall and *Browning & Tracy*, for the appellants, relied upon the following: *Smith v. Pettengill*, 15 Vert. 82; *Ross v. Page*, 6 Hammond, 166; *Hart v. Mayor, &c., of Albany*, 9 Wend. 571; *Stephens v. Beekman*, 1 Johns. Ch. 318; *Livingston v. Livingston*, 6 Ib. 497; *Jerome v. Ross*, 7 Ib. 315; *West v. Walker*, 2 Green, Ch. (N. J.) 279; *Amelung v. Lecamp*, 9 Gill & John. 468; *Irwine v. Davidson*, 3 Ired. Ch. 311; *Nevelt v. Gillaspie*, 1 How. (Miss.) 108; 1 Spence Eq. Juris. 678, 699; 1 Story's Eq. 511.

James Green, for the appellees, cited *Livingston v. Livingston*, 6 Johns. Ch. 497.

WRIGHT, C. J.—It will be unnecessary to determine in this case, whether, under our Code, a party can unite with his petition to recover for certain trespasses committed, a bill for an injunction to restrain the further commission of such trespass. This case can be determined without touching that question, for we have no hesitation in saying, that the petition for the injunction, presents no such case as warrants the ordering of any such writ. For aught that appears, the plaintiffs had a complete, perfect, full, and adequate remedy at law, for any and all trespasses these defendants had, or might commit. They are not alleged to be insolvent. There is nothing to show that the injury about to be committed, was of such an irreparable nature, as to justify the interposi-

tion of the chancery power of the court, to restrain its commission; or that an injunction was necessary, even to avoid a multiplicity of suits.

Our Code gives to the party injured, for any willful trespass in injuring his timber, treble damages, and also makes the guilty party liable to indictment, and punishment by fine, not exceeding five hundred dollars, or imprisonment in the county jail not more than one year, or by both such fine and imprisonment, at the discretion of the court. Sections 2137, 26, and 84. And we adopt the language of Chancellor KENT, in commenting on a similar statute of New York, and say, there is the less necessity for the interference of the chancellor in such cases, where the party is, by the statute, given so complete a remedy in his action at law. *Stevens v. Beekman*, 1 Johns. Ch. 318. We do not say, that there may not be cases, where the legal remedy would be incomplete, and in which an injunction might properly issue. For instance, as above suggested, the defendants might be entirely insolvent; the trespass might grow into a nuisance or waste; numberless suits might have to be brought, in order to make the remedy complete; the trespass might be by a party occupying a fiduciary relation; or the injury of such a character, that the loss would be irreparable, and not to be compensated in dollars and cents; and in any such, or similar cases, an injunction might be proper. But we are aware of no case, nor yet any principle, which will sustain an injunction in any ordinary case of trespass, as this appears to have been. Without referring to the authorities in detail, we may say, that those cited by appellants' counsel, are conclusive. See, also, Eden on Injunctions by Waterman (3d ed.), 229, 30, 31, 32, 33, 34, and notes; and the well considered case of *Jerome v. Ross*, 7 Johns. Ch. 315; as also *Livingston v. Livingston*, 6 Johns. Ch. 497, referred to by appellees, but which fully sustains the opposite view. Plaintiffs claim that the demurrer to the bill, was filed after an order made to answer, and was therefore too late; and for that reason, properly overruled. If it was true, however, that the demurrer was filed too late, it could not aid plaintiffs. If complainants'

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bill contains no equity, the defect is fatal, even on final hearing, or in the appellate court. *Kreichbaum v. Bridges*, 1 Iowa, 14. And in addition to this, the motion to dissolve the injunction, was certainly filed in time, and we are clearly of the opinion, that it should have been sustained, to say nothing of the subsequent demurrer.

Decree reversed.

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A verdict or judgment which settles and determines that a party to a suit has not an interest in the property in controversy, is ordinarily sufficient, so far as the rights of that party is concerned, without proceeding to determine who, in fact, has such right.

The chancellor may decide questions of fact himself, and refuse an issue to a jury, or he may, in the exercise of a sound discretion, direct such an issue; and in either event, the appellate court will not disturb such order, unless it appears that such discretion has been abused, and exercised in a manner unwarranted by all the circumstances.

Where the parties have, without objection, submitted issues of fact to a jury, and appear to have had a full investigation, and introduced their whole testimony on such issues, which, by the submission, they virtually concede raise the real questions in the case, every doubt in the mind of the chancellor, on such issues of fact, should be solved in favor of the finding of the jury.

Unless the finding of the jury is unconscionable, it should be allowed to stand. By the same rule, will this court be governed, in the exercise of its appellate power, in determining like cases.

Appeal from the Dubuque District Court.

IN chancery. Complainants claim a working interest in mineral lots 41 and 49; aver in their bill, that respondents unjustly deprive them of their rights in said property; and ask that their respective interests may be settled, and defendants be required to render an account of the mineral raised by them. All the material allegations of the bill, are denied in the answers; and the case was heard on the plead-

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ings, exhibits, and testimony. It appears that the parties (complainants and respondents) hold, or claim, the premises as lessees of other persons, who have the fee simple title; and the principal issue between them is, as to which has the paramount, or better, leasehold title. The case was referred to a special commissioner, to settle the issues of fact arising upon the pleadings, who reported the following:

1. Whether, at the time of the commencement of this suit, the plaintiffs, or either of them, had any right to mine and work on the mineral lot known as No. 41, in the county of Dubuque? If so, what interest had they, or either of them, therein?

2. Whether, at the time aforesaid, the said plaintiffs, or either of them, had any right to work and mine on the south half of mineral lot No. 49, in the county of Dubuque? If so, what interest had they, or either of them, therein?

3. Whether the said defendants (other than the said Waters, one of the defendants), at the time aforesaid, or either of them, had any right with the said Waters, to mine and work, by removing a rock drift, on said mineral lot No. 49?

4. Whether the said defendants, other than the said Waters, at the time and place aforesaid, or either of them, had the right to mine and work with said Waters, on the south half of mineral lot No. 49, aforesaid? If so, what interest had they, or either of them, therein?

To understand these issues, and the answers thereto, as hereinafter set forth, it is proper to state, that the complainants admit in their bill, that Daniel Waters, one of the defendants, had an interest in the south half of lot 49, but deny any interest therein in the other defendants.

The case being ready for a hearing, it was submitted to a jury, to return a special verdict, by responding to the issues so made up and settled. The verdict of the jury is as follows:

We, the jury in the above cause, find on the first question, for the plaintiffs, and that they are entitled to one-half of the working interest in mineral lot 41.

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To the second question, we, the jury, find that plaintiffs had no right to mine in the south half of mineral lot No. 49, and that neither of them had any interest in said lot.

To the third question, we find for the defendants, as set forth in said question.

To the fourth question, we, the jury, find for the defendants, and say that they are entitled to one-half of the working interest in the south half of mineral lot No. 49.

The plaintiffs thereupon filed their motion to set aside this verdict, and for a decree in their favor, according to the prayer of their bill, notwithstanding such finding, because the verdict was inconsistent, contradictory, and unintelligible—not responsive to the issues—and was against the law and the evidence. This motion was overruled, and a decree entered in accordance with the verdict, and from this, plaintiffs appeal.

Smith, McKinlay & Poor, for the appellants.

Hempstead, Burt & Nightengale, for the appellees.

WRIGHT, C. J.—To reverse this decree, complainants rely in their argument upon two grounds: 1. That the special verdict does not find and settle the rights of the parties to the south half of lot 49, and is thereupon, not responsive to the issue or issues made; and, 2. That such verdict is against, and contrary to, the evidence. The argument on the first point, is this: that notwithstanding the jury find, that defendants are entitled to one-half of the working interest in the south half of lot 49, yet there is no finding as to who is entitled to the other half, and that, therefore, there is no verdict as to that portion of the interest. By reference to the answer to the second interrogatory, however, it will be observed, that the jury expressly find, that complainants had no right to mine in the said south half of lot 49; nor had either of them any interest in said lot.

Taking the answers given, then, to the second and fourth interrogatories, in connection, it is very evident that the complainants had no interest in the south half of said lot,

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and that the defendants were entitled to one-half of the working interest therein. That the jury did not find who had the remaining interest, is of no kind of importance to the complainants, when it was once settled by the verdict, that they, at least, were not entitled to such interest. When a verdict or judgment settles and determines, that a party to a suit has not an interest in the property in controversy, this is ordinarily sufficient, so far as his rights are concerned, without proceeding to determine who, in fact, has such right.

It is urged by the complainants, that this being a chancery cause, the verdict of the jury is only to advise the conscience of the chancellor; is not like a verdict in a case at law; and that this court, as also the court below, might find for the complainants, notwithstanding the verdict. Ordinarily, under the old chancery practice, such issues were only directed when a question of fact was so involved in doubt, by conflicting or insufficient evidence, that the chancellor deemed it proper to be advised by a jury, as to the truth of such doubtful questions; and such issues were not directed, where the truth of such fact could be sufficiently and satisfactorily ascertained by the chancellor himself. *Reed v. Cline*, 9 Gratt. 136; *Baker v. Williamson*, 2 Penn. 116; *Adams Eq.* 376, note 1. And according to the same authorities, such a verdict was only to satisfy the chancellor's conscience, and if not satisfied with it, he could disregard the same. If, however, his mind concurred with such finding, or he still entertained doubts, "or if his mind still oscillates," (*Adams Eq.* note 1, 814,) the verdict was allowed to be decisive. In many of our state courts, the exercise of the discretion by the chancellor, in granting the trial of such issues by a jury, is in practice merely nominal; that is to say, that the trial of such issues has become so frequent, under what has been esteemed a proper regard for the right of trial by jury, that the exercise of such discretion stands much upon the same basis, as do all other matters referred by the law to such discretion. We entertain no doubt, but that he may decide the question or questions himself, and refuse an issue to a jury. We are equally satisfied, that in the exercise of a sound dis-

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cretion, he may direct such an issue; and in either event, we would not disturb such order, unless such discretion should appear to have been abused, and exercised in a manner unwarranted by all the circumstances. And after such finding, we would not say that the verdict is decisive or binding, to the same extent as when rendered in a suit at law. But where the parties have, without objection, submitted such issues to a jury, and appear to have had a full investigation, and introduced their whole testimony upon issues, which, by the submission, they virtually concede raise the real questions in the case, every doubt in the mind of the chancellor on such issues of facts, should be solved in favor of such finding. Unless such finding is unconscionable, it should be allowed to stand. And by the same rule, should this court be governed, in the exercise of its appellate power in determining such cases. We are far from being able to see, that the verdict was so unconscionable; and conclude that a new trial was properly refused, and that the decree must be affirmed. See Story's Eq. Jur. §§ 478, 479; 3 Greenleaf's Ev. §§ 261, 339.

Judgment affirmed.

THE WESTERN STAGE COMPANY v. WALKER.

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- In all matters within the scope of partnership dealings, or falling within the ordinary business and transactions of the firm, so long as the relation exists, each partner has the right and power to bind the partnership.
- By virtue of the relation, each partner is constituted the general agent of the firm, and is vested with a power enabling him to act at once as principal, and as the authorized agent of his copartners.
- Whilst each partner may bind the partnership by his contract, in any matter within the limits of the partnership business, he cannot bind it by any contract beyond those limits; and a dissolution of the partnership, puts an end to his authority.
- But where the partnership has contracted engagements which cannot be fulfilled during the time limited for its existence, the partnership must continue, for the purpose of performing such outstanding engagements, and of taking

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and settling all accounts, and converting the property, means, and assets of the partnership, existing at the time of its dissolution, for the benefit of all interested, although for all other purposes it is actually dissolved.

In the fulfillment of the outstanding engagements of the firm, and in the settlement of its business generally, the authority of each member remains the same after, as before, the dissolution.

The rights of the different partners are not changed by dissolution. Where there is no stipulation in the articles of copartnership to limit or control their rights, a majority of the partners, *acting fairly, and in good faith*, may conduct the partnership business, notwithstanding the dissent of a minority.

Where a contract, made by a majority of a firm, is not made in *good faith*, as to the other partners, the interest of the partners making the contract, only passes to the purchaser, and he becomes a joint owner with the partners whose interest did not pass.

Where the court has misdirected the jury on an immaterial point, or on a question not important to the decision of the cause on its merits, a new trial will not be ordered.

Where, in action of replevin, the jury found for the defendant, as to the right of property and the right of possession, and assessed his damages at a certain sum, but did not find the value of the property replevied; *Held*, That this court must presume, that the jury were properly instructed as to the measure of damages, and that the finding of the value of the property was a matter of form.

The question as to the correctness of a decision of the District Court, must first be raised in that court, by bill of exceptions, before it can be passed upon by the appellate court.

Appeal from the Des Moines District Court.

THIS was an action of replevin, to recover possession of two stage coaches and eight horses and harness, valued at \$1,600. The defendant pleaded the general issue, and property in himself. The plaintiffs, to sustain their right to the property, and to its immediate possession, gave in evidence a written agreement with the firm of John Frink & Co., of Chicago, dated May 26th, 1854, by which the said firm agreed to sell and deliver to plaintiff, all the stage stock which they, the said John Frink & Co., at the date aforesaid, had in the state of Iowa. The contract, however, was an executory one, not to be carried into effect until the 1st of July succeeding; and in the meantime, the stage stock in Iowa, was to be appraised by persons selected by the parties.

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On the 1st of July, the property was to be delivered, and the consideration money paid. On the 3d of July, the property having, in the meantime, been appraised, and a schedule and appraisement of the same returned, John Frink, one of the firm, executed a bill of sale, in the name of the firm, purporting to transfer and deliver to plaintiffs, all and singular, the property mentioned and described in the schedule and appraisement, and situate and being in the state of Iowa. The schedule embraced the property in dispute, appraised at sixteen hundred dollars. Martin O. Walker, the defendant, one of the firm of John Frink & Co., was present when the bill of sale was about to be delivered to plaintiff, and dissented to the sale and delivery of the property, first in words, and then in writing, by indorsing his protest on the schedule of the property, and on the bill of sale, to which it was annexed. It further appeared in evidence, on the part of the plaintiffs, that the property in dispute, was in the state of Iowa, on the 26th of May, 1854, and up to the 10th of June, 1854, running on the stage route of John Frink & Co., between Burlington and Fairfield, Iowa; that between the 15th and 20th of June, it had been removed from Iowa, and put upon the line in Illinois, between Burlington and Peoria, where it continued, until replevied in this suit; that it had been removed to Illinois at the time the appraisers came to Burlington to make their appraisement; but they nevertheless included the same in their schedule. On the 3d of July, when the bill of sale was executed, the plaintiffs paid Frink & Co., for the whole of the property embraced in the schedule. The defendant refusing to deliver the property in dispute to plaintiffs, on the written order of John Frink & Co., this suit is brought for its recovery, and under the writ of replevin, the property is delivered by the sheriff.

The defendant, Walker, in support of his claim to the property, gave in evidence, a bill of sale from John Frink & Co. to himself, dated June 10, 1854, whereby the said firm, in consideration of \$65,000, "grant, bargain, sell, assign, transfer, and set over, to Martin O. Walker, all the stage

stock then used or owned by them (Frink & Co.) in the state of Illinois, including (among others) the stage stock on the route between Peoria and Burlington. Payment was to be made on the 1st of July, at which time the property was to be considered vested in defendant, without any further act. On the 30th of June, Frink & Co., by their receipt, indorsed on the bill of sale, acknowledge payment in full. It was further shown by defendant, that in April, 1854, Frink & Co., by their agent at Burlington, made an arrangement with the steamboats, to carry the mails and passengers on the Burlington and Peoria route between Burlington and Oquawka, at which time the property in question was withdrawn, by the agent, from the Peoria route, and put upon the route from Burlington to Fairfield, as an accommodation line; that between the 15th and 20th of June, 1854, in consequence of the failure of the steamboats to carry the mails and passengers, it was taken back to Illinois, and again placed upon the route from Burlington to Peoria; that when withdrawn from the Peoria route, the same was deficient two coaches and eight horses and harness. Frink & Co. were not informed by the agent, of the removal of the stock from Illinois to Iowa. It further appeared in evidence, that the partnership of John Frink & Co. expired, by limitation, on the 1st of July, 1854; that M. O. Walker, the defendant, was one of the five members of the firm, present when the bill of sale was about to be made to plaintiffs; that he objected to the same, and indorsed his protest against it on the bill of sale and schedule, and gave as his reason for his dissent, that he had previously purchased of Frink & Co. two coaches and eight horses belonging to the Peoria route, and included in the schedule attached to the bill of sale, about to be made to plaintiffs. In consequence of Walker's dissent, indorsed on it, the plaintiffs objected to receiving the bill of sale, and it was never delivered; that on the next day, at the request of three members of the firm, in the absence of Walker, a second bill of sale, a copy of the first, with the exception of Walker's protest indorsed on it, was made and executed in the name of the firm. The

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reason of making the second bill of sale, was on account of Walker's dissent, indorsed on the first. Plaintiffs were present, and knew of Walker's dissent, and of his reasons for the same. The plaintiffs asked the court to give the following instructions to the jury :

"1. That for the purpose of carrying out and perfecting the contract of May 26, 1854, the firm or copartnership of John Frink & Co. did exist on the 3d day of July, 1854, the date of said bill of sale." This instruction was refused.

"2. If the Western Stage Company had not notice of the dissolution of the firm of John Frink & Co., but dealt with them after its dissolution, in carrying out the contract of 26th May, 1854, then said firm, and each member of it, is bound by such contract of confirmation, after said dissolution." This instruction was given, with the following qualification : "This is true ; but if the plaintiff knew, or had notice, that Walker, of the firm of J. Frink & Co., was present, and dissented from the terms of the bill of sale, at the time of execution, then it would not be binding on Walker."

"3. That for the purpose of carrying out the contract of May 26th, 1854, the copartnership of John Frink & Co., did exist on the 3d of July, 1854, and the bill of sale, signed by them on that day, binds each member of the firm of John Frink & Co." This instruction was given, only with the following qualification : "Not if any member of the firm was present, and protested against the execution and delivery of said bill of sale."

"4. If at the date of the contract between John Frink & Co., and the Western Stage Company, dated May 26th, 1854, the firm of John Frink & Co., was in existence, not dissolved, but doing business, and said copartnership was by its own limitation to be dissolved at a time prior to the confirmation of said agreement, or transfer of the property therein mentioned, and to be performed on the part of said John Frink & Co., after the dissolution of said firm, then for the purpose of carrying out and consummating said agreement of the 26th of May, 1854, said copartnership did, for that purpose, exist ; and if said bill of sale of July 3, 1854,

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was made and executed in accordance with said agreement of May 26, 1854, as then contemplated and agreed, it was valid and binding on each member of said firm of John Frink & Co., and passed the title to the property mentioned in said bill of sale and schedule, to the Western Stage Company, as against the firm of John Frink & Co." This instruction was given, only with the following qualification: "This is true, if they all united in making said bill of sale."

"5. That a majority of the members of a firm, have the power to bind all of its members, after its dissolution, in the confirmation or completion of a contract, made and entered into by said firm, for a valid consideration, before its dissolution.

"6. If the jury believe that the protest of Walker was not made, until after the money was paid, and the bill of sale signed, then the bill of sale passed the title to the property." These two instructions were refused by the court.

"7. If the property in controversy, was in the state of Iowa, on the 26th May, 1854, then it was included in said original agreement, and if contained in the bill of sale, passed the title to plaintiff, unless the jury believe that Walker protested before the money was paid, or the bill of sale signed by John Frink & Co." This instruction was given, only with the following qualification: "and delivered to plaintiff." To the refusal of the instructions as asked, and to the modifications of the same, by the court, as well as to the giving the following instructions, asked by defendant, the plaintiffs excepted:

"1. The plaintiff, in order to recover in this case, must prove a legal title to the present possession of the replevied property.

"2. The agreement between J. Frink & Co., and plaintiffs, dated May 26th, 1854, is not a conveyance, but an agreement to sell; and does not convey title, nor any right of possession of the property, to plaintiffs.

"3. The bill of sale between plaintiffs and J. Frink & Co., if made without Walker's assent, did not convey Walker's interest in the property, if Walker's dissent was known to

plaintiffs, or their agent, at the time; and in such case, Walker is a joint owner with plaintiffs, and plaintiffs cannot maintain this action against him.

"4. The contract between J. Frink & Co., and defendant, Walker, dated June 10th, 1854, is a conveyance to take effect on the 1st day of July, 1854; and upon the performance of the condition specified, Walker had the right to the possession of the property conveyed to him by his said contract.

"5. After the dissolution of the partnership, no partner has any right to convey the partnership property by a conveyance in the firm's name, or to sign the firm's name to such conveyance, without the consent of all the partners; and if he attempts to do so, his act will not bind any partner who dissents therefrom, and will not carry the dissenting partner's interest, and the party purchasing, cannot maintain replevin against the dissenting partner, especially if the party purchasing knew of the dissent.

"6. If plaintiffs knew of Walker's dissent to the sale to them, they could not acquire a title to Walker's interest in the property attempted to be sold, by having a new bill of sale executed, without Walker's knowledge, for the purpose of avoiding his indorsement of dissent, and the second bill of sale is no better than the first, and conveys no more than the first bill of sale.

"7. If plaintiffs, by one of their partners or agents, were present when Walker dissented, and knew of his dissent, they are chargeable with notice of his dissent to the second bill of sale, unless they show that he assented to the second bill of sale."

The jury found the right of property, as well as the right of the possession, in the defendant, and assessed his damages at sixteen hundred and eighty dollars. The plaintiffs moved to set aside the verdict, and grant a new trial, for the following reasons :

1. That the verdict of the jury is against the evidence in the case.

2. The verdict is contrary to the law and the instructions, as given in charge by the court.

3. The verdict does not find the value of the property.

This motion being overruled, and judgment rendered on the verdict, the plaintiffs appeal, and assign the following errors :

1. The court below erred in refusing to give the instructions, each and all, as asked by plaintiffs, to the jury.

2. The court erred in modifying said instructions.

3. The court erred in ruling out the answer of Wm. Vernon, to the third cross interrogatory of said plaintiffs.

4. It erred in giving the instructions to the jury, as asked by defendant.

5. The court erred in instructing the jury, as stated by said court, in the conclusion of plaintiff's second bill of exceptions, as to the facts connected with the bill of sale, or contract between M. O. Walker, and John Frink & Co., by verbal instructions.

6. The court erred in overruling plaintiffs' motion for a new trial.

7. The court erred in entering the judgment which was entered on the verdict of the jury.

8. The court erred in its instructions and proceedings, generally.

Browning & Tracey, for the appellants.

Starr & Phelps, for the appellee.

STOCKTON, J.—On the trial of this cause, in the District Court, the plaintiffs asked that certain instructions should be given to the jury, which were refused by the court, and the refusal is assigned for error.

By these instructions, the court was asked to charge the jury as to the right of a majority of the partners, against the will of a minority, to bind the firm in the consummation of a contract made before dissolution; and as to the effect and validity of the bill of sale from John Frink & Co. to plain-

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tiffs, dated July 8d, 1854. Our first inquiry is, as to the correctness of these instructions. We ascertain from the evidence, that the partnership firm of John Frink & Co., expired by limitation, on the 30th of June, 1854, at which time the agreement with plaintiffs, of the 26th of May, had not been carried into effect. The property, comprising the stage stock of the firm in the state of Iowa, had been appraised, and a schedule of the same returned by the person appointed for that purpose. When the parties met on the 3d of July, to consummate the agreement, by the payment of the money, the execution of the bill of sale, and the delivering of the property, there were five members of the firm of John Frink & Co. present. All of these assented to the sale to the plaintiffs, except Walker, who protested against the same, and gave his reason for his dissent. It does not appear how many persons composed the firm, nor whether those present were a majority of the whole. The question has been treated, in the argument, as though a majority were present, and assented; and so we shall consider it.

Neither does it appear, that there was anything in the written articles of partnership, if any such existed, to limit the rights of a majority, or to qualify, what we understand to be otherwise, the well settled rule of law, that in all matters within the scope of partnership dealings, or falling within the ordinary business and transactions of the firm, so long as the relation exists, each partner has the right and power to bind the partnership. By virtue of his relation, he is constituted the general agent of the firm, and is vested with a power, enabling him to act at once as principal, and as the authorized agent of his copartners. Story on Partnership, §§ 101, 104; *Van Kueren v. Parmlee*, 2 Const. 525; *Wilkins & Rollins v. Pearce*, 5 Denio, 540. But, whilst each partner may bind the partnership by his contracts, in any matter within the limits of the partnership business, he cannot bind it by any contract beyond those limits; and a dissolution of the partnership, puts an end to his authority. Story on Partnership, § 322; *Bell v. Morrison*, 1 Peters, 331. This may be stated as the general rule;

a well defined exception to which exists, where the partnership has contracted engagements which cannot be fulfilled during its existence. In which case, for the purpose of making good such outstanding engagements; of taking and settling all accounts, and collecting all the property, means, and assets of the partnership existing at the time of its dissolution, for the benefit of all interested, the partnership must continue, although for all other purposes it is actually dissolved. Story on Partnership, § 325. The agreement entered into by the firm with the plaintiffs, May 26, 1854, undoubtedly falls within this class of engagements. Though, as a contract for the sale and transfer of all the partnership stock in Iowa, it might not be considered as technically within the scope of the partnership, in view of a continuance of the business in which it had been engaged; yet, as the partnership was to expire on the 30th of June, succeeding, and as the agreement was made in view of its approaching dissolution, for the purpose of disposing of a portion of the stock which must necessarily be sold, in order to a settlement of the affairs of the firm, we see abundant reason for regarding it as a contract to be carried into effect after the dissolution of the partnership, and in relation to which it has been held, that for the purpose of making good such engagements, the partnership continues beyond the period fixed for its absolute termination. With this view of the law, as applicable to this cause, we are of opinion, that the first instruction asked by the plaintiffs, was improperly refused by the court.

In the fulfillment of the outstanding engagements of the firm, and in the settlement of its business generally, the authority of each member remains the same, after as before dissolution. The rights of the different partners are not changed, and where there is no stipulation in the partnership articles, to limit or control their rights, a majority of the partners, acting fairly, and in good faith, may conduct the partnership business, notwithstanding the dissent of a minority. Story's Partnership, § 125; Collyer on Partnership, 106. It does not appear, in this instance, that there was

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anything in the partnership articles of the firm of J. Frink & Co., to change the general rules of law, or to restrict the majority of the firm in the conduct of the business, and sale of the property. The only restriction placed upon them by the law, is, that their conduct should be in good faith. Upon this subject, Justice STORY says: "In every case where the decision of the majority is to govern, it would seem reasonable that the minority, if practicable, should have notice, and be consulted; and if the majority should choose wantonly, to act, without information to, or consultation with, the minority, it would hardly be deemed a *bona fide* transaction, obligatory on the latter." Story on Partnership, § 122. In *Corst v. Harris*, Turn. & Russ. 496, Lord ELDON says: "For a majority to say: We do not care what one partner may say, we being the majority, will do what we please, is, I apprehend, what this court will not allow."

Without undertaking to decide, whether the acts of the members of the firm present, when the bill of sale was about to be executed, were in good faith, or not, it appears to us, that there were circumstances attending the sale, which should have led the court below to submit that question to the jury. A majority of the firm, cannot arbitrarily trifle with the rights of the minority. The dissent of Walker, in the present instance, should have had the effect to arrest the sale to plaintiffs, until the objection urged by him was inquired into, and its truth, or falsity, satisfactorily ascertained. His dissent came in good time, and with notice to the plaintiffs. His reasons for protesting were given, and his statements were entirely uncontradicted, and unexplained. Not only were the other partners present, silent in regard to them, but they attempted, in the absence, and without the knowledge, of Walker, to get up another bill of sale, which should avoid the objections made to the first. Walker owned one hundred and twenty-one of the three hundred and ten shares of the capital stock of the firm, and was certainly entitled to some voice in its deliberations, and it was a legitimate question for the decision of the jury, whether

the effort to smother his objections, with the circumstances attending the execution of the bill of sale, were sufficient to taint the conduct of the majority of the firm with bad faith toward Walker, and thereby invalidate the bill of sale, so far as his interest in the property in dispute is concerned.

In refusing the second, third, fourth, and fifth instructions, asked by the plaintiffs, and in giving the third and fourth, as modified by the court, the jury were in effect told, that the majority of the firm could not, under any circumstances, overrule the minority in the management of the business, and that if one member protested against the sale, his interest in the property would not pass to the purchasers. We think that these instructions, as asked by the plaintiffs, should have been given, without the modification added by the court, and with the single qualification, that the jury should believe that the majority of the firm, in making the sale, were acting in good faith. The third and fifth instructions, given at the request of defendant, are equally erroneous, in laying down the law to be, that, "if the bill of sale was made without Walker's assent, and the same was known to plaintiffs, it would not convey his interest in the property;" and that, "after dissolution, no partner has a right to convey partnership property in the name of the firm, without the consent of all the partners; and if he does, his acts will not bind any partner who dissents therefrom, and will not convey such dissenting partner's interest."

We have given our reasons, why we think the court erred in giving these instructions, and why the jury should not have been charged, that Walker's protest prevented his interest in the property from passing to plaintiffs, under the bill of sale. The question, whether it passed or not, was contingent, upon a fact to be ascertained by the jury, viz: whether the majority of the firm, in making the bill of sale to plaintiffs, were acting in good faith towards Walker. The plaintiffs were entitled to have this question passed upon, and settled by the jury. If the sale and transfer were made in good faith, the interest of Walker in the property, as one of the partners, passed with that of the other members

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of the firm, to plaintiffs. If not made in good faith, then the interest only, of the other partners, passed, and plaintiffs, as joint owners, could not maintain the action of replevin. *McIlderry v. Flannegan*, 1 Harris & Gill, 322. And we must hold this to be the law, whether the plaintiffs claim under the first bill of sale, made July 3d, 1854, or under the second, made on the following day. The plaintiffs, having had notice of Walker's dissent, if the same was of any validity, to prevent his interest in the property from vesting in plaintiffs, under the first, it was quite as effectual to prevent it from passing under the second. If the first was bad, for want of good faith on the part of the other members of the firm towards Walker, the same objection applies, and quite as forcibly, to the second.

We have said this much upon the questions arising upon the bill of sale of July 3d, and Walker's protest against the same, because they have been argued at length by counsel, and are intrinsically important and interesting, whatever may be the effect of the conclusions we have arrived at upon the decision of this cause. We proceed to the other questions, raised by plaintiffs' motion for a new trial. It seems to us, that the question whether the interest of Walker in the property, passed by the bill of sale of July 3d, 1854, to plaintiffs, is altogether secondary to the question, whether or not the whole of the property had passed to Walker, under the bill of sale of John Frink & Co., of June 10th, 1854? Walker claimed, not only an interest as a member of the firm, which he was unwilling should pass to plaintiffs, but he claimed that he had purchased the horses and coaches in dispute, as a part of the stage stock on the Burlington and Peoria route, and that they were his own, and not the property of the firm. His objection to the bill of sale to plaintiffs, was that the property was not Frink & Co.'s to convey; and whether it was or not, is the important question in this cause? Frink & Co. sold to Walker, on the 10th of June, all their stage stock in the state of Illinois. It was sold in gross, and for a sum in gross. They, on the 26th of May, agreed that on the first of July succeeding,

they would sell to the plaintiffs, all their stage stock in the state of Iowa, at an appraisement and by schedule, to be made and returned by persons chosen for that purpose. The whole difficulty between the parties, has arisen from the fact that the property in question had been used by Frink & Co. in both states, having been about the 1st of May, 1854, transferred from Illinois to Iowa, and again between the 5th and 20th of June, been sent back to Illinois. The persons appointed to appraise the stock sold to plaintiffs, included in their schedule the property in question, and the schedule was attached to the bill of sale to plaintiffs. The question then arises, whether Frink & Co., on the 3d of July, had any interest in the property in dispute, which they could convey to plaintiff. There is no question as to their intention, because the property was included in the schedule attached to the bill of sale, and the majority of the firm were unquestionably seeking to convey it to the plaintiffs, at the time Walker made his objections and protested against it. Had it then been conveyed to Walker, by the bill of sale to him of June 10th? Let us look at this bill of sale. In consideration of sixty-five thousand dollars, Frink & Co. agree to grant, bargain, and sell to Walker, "all the stage stock now used or owned by us in the state of Illinois, including the stage stock on (among others) the Burlington and Peoria route, and all such personal property and other articles used in, about, or upon said route, and in the state of Illinois."

The court charged the jury, that if the property in controversy was not in the state of Illinois on the 10th, the title of the same did not pass under the bill of sale, according to the strict letter of the same; but that they were authorized to judge and determine what was the intention of the parties; and if they thought it was their design to sell to Walker, all the stage stock that belonged to the Burlington and Peoria route, they should so determine by their verdict, and give to defendant all the stage stock belonging to the Illinois route, wherever it might be temporarily, or casually situated. This, in substance, is the instruction of the court,

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and the jury found that Walker was entitled to the right of property, as well as the right of possession. The jury, by their verdict, ascertained that the property, in dispute, passed to Walker, under the bill of sale to him, of June 10th, 1854. We think we are justified in this conclusion, by the language of the verdict. It was directly responsive to the issue made for their decision, under the direction of the court; and there is, in our opinion, no reason for supposing that their verdict was induced or influenced, by what we consider the erroneous instructions of the court, as to the effect of the bill of sale, of July 3d, 1854. If there was any room for doubt on this subject, we should be disposed to give the plaintiffs the benefit of that doubt, by ordering a new trial. They find the right of property, as well as the right of possession, in defendant, and allow him, as damages, the appraised value of the property, with interest at six per centum per annum, from the date of the replevin till the day of the rendition of the verdict. How could the jury have found such a verdict, but by finding that the property passed to Walker, under the bill of sale of June 10th, 1854? The facts do not admit of any other conclusion. The verdict cannot be looked upon as anything but an ascertainment by the jury, that it was the design and intention of the parties, that the interest of John Frink & Co., should pass to the defendant by the bill of sale of June 10th, and that it did so pass. If it did, then, the firm had no interest in the property in dispute, to convey to plaintiff by the bill of sale of July 3d, 1854. They had previously parted with it to defendant. All the bills of sale they could have made, would not have strengthened or helped the plaintiffs' right. Walker's right, as absolute owner, overrides his interest as partner, and his dissent acquires a double significance, when it is understood as intended, not merely to prevent the transfer of his interest as a partner, but as a protest against the sale of property of which he was the absolute owner. The finding of the jury, on the question of the absolute ownership of the property, rendered it unnecessary that they should consider the question of the effect of the bill of sale of July

3d, 1854. As the greater always includes the lesser, so if Walker had acquired the complete title, by the bill of sale of June 10th, there was no necessity for an inquiry on the part of the jury, whether he retained an interest as partner after the bill of sale of July 3d. The plaintiffs' only claim of title was under the latter bill of sale, and if the jury were convinced that, before the time of its execution, the parties making it, had parted with all their interest, there was little need of investigation into the validity of the bill of sale of July 3d, when, whatever conclusion they might have arrived at, it could not have altered their verdict on the paramount question of defendant's title, under the sale of June 10th, 1854. If the charge of the court had been different—if it had been in accordance with what we have indicated the law, in our judgment to be—and the jury, upon consultation, had found that the bill of sale of Frink & Co., was made in good faith—still, it could only convey to plaintiffs, the interest in the property which the partnership firm held at that time. If they had previously sold and conveyed their interest to Walker, there was none to sell and convey to plaintiffs, and the bill of sale of July 3d, passed nothing. If we could see that the charge of the court, had in any respect misled the jury, in making up their verdict upon what we deem the paramount question of the absolute title of Walker, under the bill of sale of June 10th, or had in the slightest degree prejudiced the plaintiffs' cause, we should reverse the judgment, and order a new trial. But where the court has misdirected the jury on an immaterial point, or on a question not important to the decision of the cause on its merits, we shall hesitate a long time before we disturb their verdict. We must see more in the record than we see in this, to induce us to order a new trial.

The plaintiffs' motion for a new trial rests upon the alleged ground, that the verdict was against the evidence, and against the instructions of the court, and that the jury did not find the value of the property. The jury were told that they were to decide, whether the property in controversy belonged legitimately to the Illinois, or to the Iowa

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stage stock of John Frink & Co., and that if they were of opinion it belonged to the Illinois stage stock, it passed to defendant, under the bill of sale of June 10, 1854, and they were to return their verdict accordingly; or, in the language of the court, they were to effectuate the true intention of the parties, and to give to the defendant the property which in fact belonged, at that time, to the Illinois stage stock, wherever else it might temporarily be at the time." This charge of the court, left to the jury the determination of the fact, and the all important question in this case, viz: whether the property belonged to the Illinois, or to the Iowa stage stock of Frink & Co. We do not see from the record, that they have found against the weight of the evidence, or that they have given a wrong interpretation to the understanding and intentions of the parties to the bill of sale of June 10, 1854. If the property in question was part of the Illinois stage stock, on the Burlington and Peoria route, it was embraced by the terms of the bill of sale to defendant, and the verdict of the jury was in accordance with the intention of the parties to that agreement. That was a question to be determined by the jury.

The objection that the verdict of the jury does not find the value of the property, is not, in our opinion, well founded. We must presume that the jury were properly instructed by the court, as to the measure of damages, if they found for the defendant; and there is good reason to believe that the value of the property replevied, with interest, was the amount found by the jury. The finding of the value of the property, would be mere matter of form. If the amount of damages in this case were too small, it might be a matter of complaint on the part of defendant. We do not understand the plaintiffs to complain that the damages are excessive. We may state, that we have not examined the questions raised by plaintiffs' third and fifth assignment of errors, because the ruling out the answer of Vernon to the third cross interrogatory, and the verbal instructions given by the court, as to the effect of the bill of sale to defendant, dated June 10, 1854, were not excepted

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to in the District Court. The question as to the correctness of the decision of that court, must first be raised there, by bill of exceptions, before it can be passed upon here.

Judgment affirmed.

KENNEDY v. THE DUBUQUE AND PACIFIC RAILROAD CO.

Where in an action against a railroad company for damages, in taking certain real estate for the construction of their road, the jury found for the plaintiff a certain sum for his damages, and a certain other sum for building a fence, and keeping the same in repair, for the aggregate of which sums, judgment was rendered against the company; and where it was not specifically shown in the special verdict, that plaintiff was allowed for building a fence, *as fence*, and thereupon it was urged that the case did not come within the rule laid down in *Henry v. The Dubuque and Pacific Railroad Co.*, *ante*, 288; *Held*, That there was no substantial difference between the two cases, and that the judgment must be reversed.

Appeal from the Dubuque District Court.

Smith, McKinlay & Poor, for the appellant.

Burt & Barker, for the appellee.

WRIGHT, C. J.—This case raises substantially the same questions (so far as presented by counsel), as were decided at the last term of this court, in the case of *Henry v. Dubuque and Pacific Railroad Co.*, *ante*, 288. An examination of it at length is, therefore, unnecessary, especially as we see no good ground for abandoning the positions there taken. One point of difference has been urged, however, by counsel, and to that alone we direct attention. In the former case, the jury found as a part of a special verdict, that plaintiff was entitled to a certain sum for building a fence along the line of the railroad, which was proposed to be constructed by the company over his land, and eight per cent. per annum for keeping the said fence in repair for forty-

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eight years. In this case, the jury found for the plaintiff, a certain sum for his damages, and a certain other sum for building a fence, and keeping the same in repair, for the aggregate of which sums, judgment was rendered against the defendant. Counsel now claim, that it is not apparent in this case, as in the former, that plaintiff was allowed for building a fence or fences—because it is not so specifically shown and set forth in the special verdict; and that, therefore, this does not come within the objection taken in that. We are unable to see any substantial difference, however. The ruling of the court in the former case, in relation to allowing the plaintiff for fencing, was not reversed alone, because of the judgment for eight per cent. per annum, on the original cost of the fence, but principally because the jury was instructed to, and did, allow damages for fencing as such. The same objection is apparent in the case before us. The only difference is, that in the former case, the jury found such an amount for building the fence, and a per cent. thereon, to be paid each year, for forty-eight years, for keeping the same in repair; and in this, the verdict finds so much in the aggregate for building and keeping the fence in repair. If the one was improper, so was the other.

Judgment reversed.

WEST & CO. v. BARGE LADY FRANKLIN.

In an action against a boat, for labor and materials furnished, a petition which alleges that such labor and materials were furnished at the instance and request of the said boat, is sufficient.

The petition, in such a case, need not allege that the work was done, or materials furnished, on a contract made with the master, owner, agent, clerk, or consignee, of said boat.

Appeal from the Dubuque District Court.

THE plaintiffs filed their petition in the District Court against the barge Lady Franklin, seeking to recover \$252.62,

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for the labor and materials alleged in the petition, to have been furnished at the instance and request of said barge, for the repair of the same. A demurrer to the petition was sustained, on the ground that it did not allege that the work was done, or material furnished, on a contract made with the master, owner, agent, clerk, or consignee of the boat. To the judgment of the court, in sustaining the demurrer, and dismissing the suit, plaintiffs excepted. They now appeal, and assign the same for error.

Witsee & Blutchly, for the appellants.

Nightengale & Wilson, for the appellee.

STOCKTON, J.—It is assigned for error, that the court erred in holding, that it was necessary to allege in the petition, that the work was done or materials furnished, on a contract with the master, owner, agent, or consignee of the boat, and that it was not sufficient to allege that the contract was made with the boat itself.

We think, that section 2130 of the Code of Iowa, settles the only question in this cause. It was sufficient, in our opinion, to allege, as the plaintiffs did, that the contract was made with the barge. This was all the law required, and if the plaintiffs have brought themselves within the requirements of the above-named section, the petition is sufficient. What the plaintiffs may be required to prove, to entitle them to recover, is a different question, to be determined by the court, when the evidence is before it. We think the court erred in sustaining the demurrer, and dismissing the petition, and the judgment is reversed.

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The grant of a franchise by the state, cannot extend beyond her own limits. The state of Iowa could not grant a ferry right, which would operate, or confer any rights, on the territory of the state of Wisconsin.

Still less does such a grant, authorize the grantee to transport passengers from the Wisconsin to the Iowa side of the Mississippi river.

So, a similar grant by Wisconsin, gives no authority on the Iowa shore, and confers no right to transport from the Iowa side.

Section twelve of the act entitled "An act to regulate ferries," approved February 16, 1843, which provides, that no license shall be granted to keep a ferry on said Mississippi river, within two miles of any other licensed or chartered ferry, applies only to licenses and charters granted under the authority of this state.

Such restrictions in the statutes of a state, have reference to its own acts, and not those of other states, unless the language be express, or the construction essentially necessary.

Any person has a right to transport himself and property over a river, in his own boat, although there may be a ferry at the place where he crosses; but if he makes this right a cover for carrying travelers, it then becomes an infringement of the ferry right.

The transportation of passengers in a mail coach, is not embraced in a contract for carrying the mail, but is an independent matter of private speculation and benefit.

Appeal from the Dubuque District Court.

THIS action is brought to recover damages for an infringement of a ferry right. Weld had a license, granted in 1850, and renewed in 1851, by the board of commissioners of Dubuque county, Iowa, to ferry across the Mississippi river, from a point called Weld's ferry, in Iowa. This was in force from July, 1850, to July, 1852. Chapman held a license, granted in 1849, by the county court of Grant county, in Wisconsin, for the term of three years, from the 24th of August, 1849, to ferry from the landing at the town of Potosi, in Wisconsin, across the Grant and Mississippi rivers. It appears that, in general, each transported from his own side of the river. But it farther appears that in 1850 and 1851, Chapman was a carrier of the United States mail, and that

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he conveyed the mail coaches, with the mail and passengers, in his boats, from the above ferry landing on the Iowa side, to the Wisconsin side; and that he received a certain sum for conveying passengers from Dubuque (the town) to Potosi and beyond; but it was not shown, that he received anything from the passengers specifically as ferriage.

Weld sues Chapman, for an infringement of his rights in the ferry from the Iowa shore. It appears, that in crossing the river, the parties' boats pursued substantially the same course, and landed at the same points on each side. The defendant contended, and asked the court to charge the jury, that Weld had not such an exclusive right, as would enable him to maintain an action for carrying the passengers in the mail coaches as aforesaid, especially, if the jury believe, that he received no ferriage as such, for crossing said passengers, but only received a gross sum as aforesaid. He also asked the court to instruct, that the defendant, having a prior right there to ferry, Weld had no right to keep on, and to transport passengers, and that if he did, the defendant could recover from him. He also requested the instruction, that having a prior right, as aforesaid, he had a right to carry passengers both ways, by virtue of the laws of Wisconsin. The court refused to give these instructions, and the defendant excepted.

Smith, McKinlay & Poor, for the appellant, contended:

1. The board of commissioners were expressly prohibited, from granting another ferry, within two miles of any licensed or chartered ferry. See statute 1848, 267.

2. Concurrent jurisdiction is expressly given to Wisconsin and Iowa, on the waters of the Mississippi. Code, § 3; Act of Congress, admitting Iowa, Code, 538; Const. of Wisconsin, Rev. Statutes, 33.

3. Chapman had an exclusive charter from Wisconsin, for Grant river, and the Mississippi. See Acts of 1846, 128; *Jones v. Johnson*, 2 Ala. 746; *State v. Cameron*, 2 Chandler, 172.

4. Chapman should have damages allowed to him, for the

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interference with his exclusive right by Weld, and as Weld had no right, he should maintain no action.

Burt & Barker, for the appellee, cited the following: 2 Bouv. Ins. 86; 6 Peters, 709; *In the Matter of Ferguson, a soldier of the U. S. Army*, 9 Johns. 239; Story's Conf. of Laws, 28; Ohio Statutes, 430; 1 Kent's Com. 428; 7 Grat-tan, 230.

WOODWARD, J.—The defendant claims, first, an exclusive right to ferry at that place; second, at least, a right to ferry both ways; or third, a right to transport the mail coaches, with the passengers therein.

The grant of a franchise by the state, cannot extend beyond her own limits. She grants such rights as she may lawfully give, and no more; nothing beyond the state limits is contemplated. This is true of grants of a territorial nature, at least; or of those to be exercised on given ground. A ferry is mainly in respect to the landing, not of the water; therefore, this state could not grant a ferry right which should operate on the Wisconsin shore. The right to land there, does not depend on the ferry franchise granted by Iowa, and still less does a ferry right, under the authority of Iowa, authorize the person licensed, to transport passengers from that side to this. That power belongs to Wisconsin.

So, on the other hand, a similar grant by Wisconsin, gives no authority on the Iowa shore; and it gives no right to transport from the Iowa side. *Ross v. Page*, 6-7 Ohio, 76; *Somerville v. Wimbish*, 7 Grat. 205, 230; *Memplus v. Overton*, 3 Yerg. 887; Story's Conf. L. § 20. The defendant, therefore, had not an exclusive right to ferry at the place named; nor has he, by virtue of his Wisconsin license, a right to ferry from the Iowa shore.

But the defendant contends, that the plaintiff's license is not valid, for that it is contrary to the statute of 1843, which enacts that no license shall be granted to keep a ferry on said Mississippi river, within two miles of any other licensed or chartered ferry. Rev. Stat. 267. He claims that as his

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right, granted in Wisconsin, was prior to the plaintiff's in Iowa, the latter comes under this prohibition. We do not think so. The language of the statute must be construed in relation to licenses and charters under the authority of this state. Such terms in the statutes of a state, refer to its own doings, and not those of other states, unless the language be express, or the construction essentially necessary. And this is indicated by the next sentence of the same section, in immediate connection with the foregoing words—"provided this act shall not be so construed, as to extend the present chartered limits of any ferries on the Mississippi river." The one sentence may as well be applied to licenses granted in another state, as the other.

The only other question is, whether the case is changed by the fact, that the defendant was a carrier of the mail, and was transporting the mail coach and the passengers. We understand the case to mean, that he was a contractor to carry the mail from Dubuque to Potosi, or beyond that. Any person has the right to transport himself over the river, in his own boat, although there may be a ferry at the same place. So, also, may he do with his own horse, or other team, and his carriage. But, if he makes this a cover for carrying travelers, it then becomes an infringement of the ferry right. And it would hardly seem, that the essence of the matter, consisted in taking pay or toll; for then, one vindictively disposed, might be willing to make a sacrifice, for the sake of ruining the franchise of another. This every one has seen practiced, in one form or another. The defendant, in the same manner, might transport his teams and coaches. But this right does not depend upon his being the holder of a ferry license, nor upon his being the carrier of the mail. He has the right, independently of these facts; but when he makes these private or individual rights, the medium or the cover of conveying travelers, whose custom legally belongs to the plaintiff, he cannot sustain his position, any more than another individual who does the same thing, under any other pretence. The copy of the defendant's license in the bill of exceptions, is accompanied by a

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table of rates of tolls, from which it appears that when a carriage passes, he may charge twelve and a-half cents additional for each person therein, after the first person. Now, although he does not charge the passenger's ferriage as such, yet it is fair to presume, that his charge for transportation from Dubuque to Potosi or elsewhere, embraces this item to a greater or less extent. And thus he obtains the same benefit under another name; and even if he does not, it is the same thing, if he deprives the other of that which belongs to him. This may be inconvenient, but it only manifests the necessity of an amicable arrangement. The power or right which the defendant claims, can be conceded to him, only by taking a ground which would enable one to destroy the franchise of another, if he were willing to do it at a sacrifice to himself, and instances of the kind, are not unknown. The transportation of passengers, is not embraced in defendant's contract for carrying the mail, but is an independent matter of private speculation and benefit.

The judgment of the District Court is affirmed.

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Although the language of our statute of frauds is somewhat different from that of the fourth section of 29 Charles II, yet it is so much like it in terms, that the English and American authorities upon the construction of the English statute, are entitled to the same consideration as upon questions at common law.

Although the English statute provides that *no action shall be brought*, whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum, or note thereof, shall be in writing, &c., while ours provides that *no evidence of any such contract is competent*, unless in writing, the effect is the same in both cases.

The meaning is, that such actions cannot be maintained, under either statute, unless the contract is in writing, as therein required, save in the exceptions provided for by our statute.

Our statute, by so far innovating upon the original statute of frauds, as to al-

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low the party making the alleged promise, to be called on to the witness stand, and his oral testimony, so obtained, to be evidence of the contract, never contemplated relaxing the rule, requiring an agreement to answer for the debt of another, to be in writing.

J. P. executed his promissory note for a certain sum, payable in ninety days, and about the time of its maturity, stopped payment. Before, and after, the maturity of the note, the payees called upon the defendant, the father of J. P., and informed him that they were about to sue thereon, and attach the property of J. P. The defendant insisted that this should not be done, and said that he was getting his son's property into his hands, and that he would pay the note. The debt could have been made by attachment, but on account of this promise, suit was not brought. The defendant was asked to indorse the note, but declined, for the reason that it could then be sold to a banker, and he be sued upon it immediately. After this promise of defendant, the note was assigned to the plaintiff. J. P. was never released from his liability on the note; the promise of defendant was not evidenced by any writing signed by him, or by any person for him. The defendant being sued on this verbal promise, answered, denied the promise, or its validity, and pleaded the statute of frauds; and there being no evidence to show, that defendant did get his son's property into his hands, and the alleged promise being proved by one of the payees of the note, and not by the defendant himself, the defendant asked the court to instruct the jury as follows: "1. That unless the jury believe that J. P. was wholly released on said note, they must find for defendant. 2. That no evidence is competent to prove the alleged promise, other than that of defendant's handwriting, or that of his lawfully authorized agent, or the testimony of defendant himself, upon the witness stand," which instructions the court refused to give.

Held, 1. That the promise was nothing more than one of those cases where A. becomes the surety for the debt of B., in consideration that the creditor will forbear to sue, or to prosecute a suit already commenced.

2. That the agreement to forbear, might be a good consideration to support the promise, if in writing, but not a consideration of such a character as to make a new and original transaction between the parties.

3. That it was error to refuse the instructions.

Appeal from the Dubuque District Court.

In November, 1852, James Peacock (the son of the defendant), gave his note, payable to Heidelback & Co., for \$680.60, due in ninety days; and about the time of its maturity, stopped payment. Before and after the maturity of said note, one of the payees called upon the defendant, and informed him that they were about to sue thereon, and to attach the property of James. The defendant insisted

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that this should not be done, and said that he was getting his son's property into his hands, and that he would pay the note. The debt could have been made by attachment, but on account of the promise of the defendant, suit was not brought. Defendant was asked to indorse the note, but declined, for the reason that it could then be sold to a banker, and he be sued upon it, immediately. After this time, the note was assigned to plaintiff. James Peacock has never been released from his liability on the note. The promise of defendant was not evidenced by any writing, signed by him, or by any person for him; nor was there anything to show that defendant did get his son's property into his hands. This suit is brought upon this verbal promise. The defendant, in his answer, denies the undertaking as charged, also its validity, and pleads the statute of frauds. The promise was proved by one of the original payees, and not by the defendant. On the trial, the defendant asked the court to charge the jury as follows:

1. That unless they believe that James Peacock was wholly released on said note, they must find for defendant.

2. That no evidence is competent to prove the alleged promise, other than that of George Peacock's handwriting, or that of his lawfully authorized agent; or the testimony of George Peacock himself, on the witness stand.

Which instructions were refused, to which defendant excepted. Verdict and judgment for plaintiff, and defendant appeals.

Smith, McKinlay & Poor, for the appellant, relied upon the following authorities: *Miller v. Gaston*, 2 Hill, 188; *Taylor v. Binney*, 7 Mass. 479; 1 Parsons on Cont. 493; *True v. Fuller*, 2 Pick. 140; *McDoal v. Yeomans*, 8 Watts, 361; *Springer v. Hutchinson*, 19 Maine, 359; Birge on Surety, 20; *Tomlinson v. Gell*, 6 Adolph. & Ellis, 564; 33 Eng. Com. Law, 148; *Emerick v. Sanders*, 1 Wis. 100; 1 Crompt. & Jer. Exch. 374; *Muggs v. Ames*, 15 Eng. Com. Law, 47; *Birkmyr v. Dannell*, 1 Smith's Lead. Cases, 269; *Swan's Treat.* 318; *Anderson v. Davis*, 9 Vermont, 186;

Chadwick v. Brown, Morris, 492; *Rix v. Admrs. of Troup*, 9 Vermont, 233.

Burt & Barker, for the appellee, cited no authorities.

WRIGHT, C. J.—We think it was error to refuse these instructions. The language of our statute of frauds is somewhat different from that of the fourth section of 29 Car. II, and yet so much like it in terms, that the English and American authorities upon its construction, are entitled to the same consideration as upon questions at common law. That statute provides that no action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person, thereunto by him lawfully authorized. Our statute provides, that except when otherwise specially provided, *no evidence* of any such contract is competent unless it is in writing, and signed by the party to be charged, or by his lawfully authorized agent. Sections 2409 and 2410. And while the next sections make certain exceptions, yet they are not such as apply to this case, for the reason that the contract is denied in the pleadings, nor was the defendant called as a witness, in order to establish the oral contract. As applied to this case, then, the only difference is, that the English statute provides "that no action shall be brought," while ours provides that "no evidence of any such contract is competent," but the effect is the same in both cases. The meaning, as we apprehend, is, that such actions cannot be maintained under either, unless the contract is in writing as therein required, save in the cases provided for by our statute. It is true that in one sense, our statute is but a regulation relating to the proof of contracts, and yet, unless a case shall be brought within one of the exceptions provided for, it cannot be maintained, any more than if the legislature had used the language of the

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English statute. The same evil was known to exist, and it was designed to apply the same remedy. The inquiry is the same, then, whether we are asked to determine as to the competency of the evidence, or the right of the plaintiff to bring and maintain his action. The action cannot be maintained without competent testimony, and our statute provides what alone shall be competent in such cases as that now before us.

It will be observed, from the statement of the case, that James Peacock was not discharged from his liability on the note; nor, in the opinion of the court below, was it necessary that he should be so discharged, in order to make the defendant liable in this action. And we suppose, that the refusal to give the instructions, was on the ground, that this was an original undertaking on the part of defendant, founded upon a new, independent, and sufficient consideration, and as such was valid. The second instruction could only have been refused, as we conclude, for this reason, for, as a legal proposition, it is clearly correct. And here it is well to bear in mind, that defendant's liability, if there is any, arises upon a promise made or given, subsequent to the time of the creation of the original debt. And, in such cases, while the subsisting liability is the ground of the promise, but such collateral undertaking is not the inducement to the creation of the debt, there must be some further consideration shown, having an immediate respect to such liability; for the consideration for the original debt, will not attach to the subsequent promise. *Leonard v. Vredenburg*, 8 Johns. 29. But when thus made subsequent, if the consideration is new, and distinct in its nature; or (in the words of KENT, C. J., in the above case), "arises out of some new and original consideration of benefit or harm, moving between the newly contracting parties," the promise is not within the statute. This case must be sustained under the class of cases last named, or must fail.

We think this is nothing more than one of those cases, where A. becomes the surety for the debt of B., in consideration that the creditor will forbear to sue, or to prosecute a

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suit already commenced. The agreement to forbear might be a good consideration to support the promise, if in writing, but not a consideration of such a character, as to make a new and original transaction between the parties. There is nothing to show, that the defendant, when he made the promise, had in view or secured a benefit, which accrued immediately to himself. On the contrary, his object was to obtain forbearance or benefit to his son. If for his own benefit, the promise would not be within the statute; if for the debtor, it would. And this distinction, we think important, and one that is clearly recognized by the authorities. The case of *Nelson v. Boynton*, 3 Metc. 396, is very similar to the one before us, and clearly recognizes the rule above laid down. There the creditor commenced his action against the defendant's father, on two promissory notes, and attached certain real estate as security. Before the action was entered in court, the defendant promised the plaintiff, that if he would discontinue the suit, he would pay him the amount of the notes, and the suit was accordingly discontinued. The notes were not given up, nor was the father discharged. It was held, that the promise of the son was within the statute of frauds; a promise to pay the debt of the father; and, therefore, though made on a good consideration, was not valid, without a promise or memorandum of the agreement in writing; and, in *Jackson v. Raynor*, 12 Johns. 291, the son of the defendant had given his promissory note, which was held by plaintiff. The son was sued, and his property about to be taken upon a warrant, when the father told the officer not to serve the writ, "for he would pay the debt, if an honest one," and thereupon the plaintiff was satisfied, and withdrew his suit. Soon afterward, the father saw the officer, and requested him "to tell the plaintiff to give himself no further trouble about it, for he would pay the debt, as he had taken his son's property, and meant to pay his honest debts." The father was sued on this promise, and relied, in his defence, on the statute of frauds. The defence was sustained, upon the ground, that the promise was to pay the debt of another, which debt still subsisted,

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and as such, the promise should have been in writing. See, also, *Simpson v. Potter*, 4 Johns. 422; *Corthing v. Aubert*, 2 East, 825; *Chandler v. Davidson*, 6 Blackf. 367. In this last case, BLACKFORD, J., says: "There are, no doubt, cases in which a verbal promise to pay the amount of another's debt, is an original promise, and not within the statute of frauds. They are cases, however, in which a new consideration passes at the time of the promise, between the new contracting parties, of such a character, that it would support a promise to the plaintiff, for the payment of the same sum of money, without reference to any debt from another;" and such is the case, he says, of *Williams v. Leper*, 8 Burr. 1886; and we may add, that an examination of that case, will show that the plaintiff had a lien upon property, which was discharged for the benefit, and at the request, of the party promising, and, under such circumstances, the promise was properly held valid. The case, also, of *Chadwick v. Brown*, Morris, 492, though not very fully reported, would appear to be conclusive upon this question.

We conclude, therefore, that these instructions were improperly refused, and that the case must be reversed. Our statute, by so far innovating upon the original statute of frauds, as to allow the party making the alleged promise, to be called on to the witness stand, and his oral testimony, so obtained, to be evidence of the contract, never contemplated relaxing the rule, requiring an agreement to answer for the debt of another, to be in writing. The object of the statute originally was, to avoid subjecting third persons to liabilities for the debts of others, upon the testimony of witnesses, who might be mistaken as to the language used, or willfully misstate its purport. Where the party to be charged, himself is the witness by whom the contract is to be established, however, it seems but just that he should not be allowed to complain, if he is charged on his own testimony. Nor should the other party, with such a privilege given, recover upon a weaker case, than before such innovation.

Judgment reversed.

JOHNSON & STEVENS v. BUTLER.

Sections 1848 to 1851 of the Code, inclusive, were intended to draw the line, and recognize the distinction, between actions *ex contractu* and actions *ex delicto*.

Sections one and three of the act allowing and regulating writs of attachment, approved February 16, 1843, recognize the distinction between actions *ex contractu*, and actions *ex delicto*.

When a judgment has been recovered for a *tert*, it then is fixed and certain, and is a *debt*, as much as if it were recovered upon a promise; and an action brought upon such a judgment, under the present, as well as the former practice, is an action *ex contractu*.

Where in an action, commenced by attachment, on a judgment recovered in another state in an action of replevin, the defendant moved to quash the attachment, because the writ had not been allowed as required by section 1851 of the Code, which motion was sustained, and the writ quashed; *Held*, That the court erred in quashing the attachment.

A motion to compel a party to produce a paper, the existence of which is not shown by the record, must be supported by an affidavit, showing the requisite facts.

But whether such an affidavit is required, when the record does show the former existence of such paper, *quere?*

In an action upon a judgment recovered in another state, the defendant cannot plead any defence which he might have made in the former suit.

In such an action, the plaintiff can, *by pleading*, be compelled to show enough of the record, to prove a valid judgment recovered; but he cannot, by motion, be obliged to produce any particular part of the record.

And where, in such an action, the defendant filed a motion, that the plaintiff be ruled to complete the record, by filing a certain paper described in the motion, which motion was sustained; and where, the paper not being produced, the court rendered judgment of nonsuit against the plaintiff; *Held*, That the court erred in sustaining the motion, and dismissing the suit.

Appeal from the Dubuque District Court.

BUTLER brought an action of replevin, in Jo Daviess county, Illinois, against Henry R. Merkling, and in that action, took possession of a considerable quantity of personal property, the principal value of which consisted in its almost constant use. Such proceedings were had in the cause, that Merkling recovered judgment against Butler for \$2,200, for the detention of the goods. Butler filed a motion to set aside

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the verdict, and for a new trial, which was overruled by the Circuit Court. The matter was taken to the Supreme Court of Illinois, and reversed. On a new trial in the Circuit Court, Merkling recovered a verdict and judgment, for \$1,833.33. To set aside which, another motion was made, but it was overruled. The cause stood thus in the courts of Illinois. Merkling assigned the above judgment to the present plaintiffs, who now sue Butler on that judgment, in Iowa, with the auxiliary process of attachment, based upon the ground that the defendant, Butler, was not a resident of the state of Iowa. In the District Court of Iowa, in Dubuque county, the defendant moved to dismiss the attachment, because the provisions of section 1851 of the Code were not observed, which motion was sustained.

It appears that in the Circuit Court of Illinois, the then defendant, Merkling, moved for leave to take from the files, the motion and reasons of the plaintiff, filed for arrest of the verdict and judgment thereon, which leave was granted. This motion was made after the second verdict and judgment were rendered; to wit, on the 28th May, 1855. And on the 30th of the same month, another motion was made to set aside the second verdict and judgment, which was overruled. In the District Court of Iowa, the then defendant, Butler, moved that the plaintiffs, "be ruled to complete the record and proceedings, upon which this suit is brought, by filing a certified copy of the exceptions, upon which, as appears by the record, the Supreme Court of the state of Illinois, reversed the judgment obtained in the Circuit Court of Jo Daviess county. The court in Dubuque county, sustained this motion, and ordered the paper to be produced, to which the plaintiffs excepted; and the paper not being produced, the court rendered judgment of nonsuit against the plaintiffs.

Smith, McKinlay & Poor, for the appellant.

Is a judgment of a court of record of the state of Illinois (or any other judgment), a contract within the meaning of section 1949 of the Code of Iowa? Blackstone Com. 446

(original paging), says: "A debt of record, is a sum of money which appears to be due by the evidence of a court of record. Thus, where any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law, this is a *contract* of the highest nature, being established by the sentence of a court of judicature." Chitty on Contracts, 2, says: "Contracts may be classed in their relative order or degree of superiority: 1. Of record; 2. Specialities; 3. Simple contracts." "1. Contracts of record: contracts or obligations of record, are judgments, recognizances, or statutes staple, and these are of superior force, because they have been promulgated by, or founded upon, the authority, and have received the sanction, of a court of record." Story on Contracts, 2, says: "Contracts are divided into three classes: 1. Contracts of record, such as judgments, recognizances, and statutes staple." Parsons on Contracts, 7, says: Contracts by specialty, are of two kinds, contracts under seal, and contracts of record. These last are judgments, recognizances, and statutes staple." Such is the definition of every elementary writer on the subject; and is it not fair to presume that the legislature framed the law, with these definitions in view, rather than the definition given by the court of Illinois, in the case in 3 Scammon, 268, which case is the only one relied on by the other side, to sustain their view of the case? The only authority cited by the court, in 3 Scammon, 268, is 3 Burrow, 1548; but the correctness of the decision in 3 Burrow, is doubted by Lord Mansfield, at the next term, in *Trinder v. Watson*, 3 Burrow, 1566. The very point arising in this case, was decided in the case of *McGuire v. Gallagher*, 2 Sandford's S. C. 402. The court says: "We regard a judgment, as being a contract of the highest character."

The Code, section 2503, provides that the Code shall receive a liberal construction, in order to carry out its general purpose and objects. The general purpose and object of sections 1849 and 1851 of the Code, is, to ascertain how much property may be attached by the sheriff. If the action is founded on contract, the sheriff must levy upon

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property fifty per cent. greater than the amount sworn to be due; but if not on contract, for instance, if for assault and battery, trespass, or slander, where no amount can be arrived at, until a verdict be had, the plaintiff must present his petition to a judge, who, from the case stated, shall make an allowance of the amount in value of the property that may be attached. The amount to be recovered, is so uncertain in such cases, that the petitioner is not permitted to fix the amount of his damages, so far as the proceedings in attachment are concerned, but some judge must do it for him, until the damages are properly ascertained by a jury. A judgment of a court of record, has no such uncertainty about it; the amount due is easily ascertained. It is equally certain as any other contract. A judgment, therefore, is a contract under section 1849 of the Code.

The other point in the case, is the action of the District Court in dismissing the cause, because of plaintiff's refusal to file a copy of the exceptions referred to in a motion made by defendant's counsel. The motion was founded, not upon a fact, but upon a mere assumption of a fact. It moves that the transcript be made complete, by filing a copy of the exceptions, whereas, an inspection of the record will show, that no exceptions were taken, nor were any referred to, in the opinion of the Supreme Court of Illinois; besides, the certificate to the transcript, shows that the transcript is complete, and were it allowable to impeach the certificate, by motion, as was attempted in this case, it would be necessary to show, by the transcript itself, or by affidavit, that it was incorrect. The motion was not supported by affidavit, and as it was founded upon an alleged fact, which was nowhere apparent in the record, it was not entitled to be heard by the court. The acts of Congress of 26th May, 1790, and 27th March, 1804 (see Code of Iowa, 568), provide for the manner in which a record of a court of a sister state, shall be certified, and the transcript in this case, is certified precisely as required; and, therefore, full faith and credit ought to be given to it, as provided for by these acts of Congress. The clerk's certificate is, that the transcript is complete, and the District Court had no an-

thority, under the circumstances, to say that it was incomplete.

Nightengale & Wilson, for the appellee.

The question presented, is simply: Is a judgment, recovered in an action of replevin in another state, a demand founded on contract, within the meaning of chapter 109 of the Code? The proceedings authorized by that chapter, are limited to actions for the recovery of money. To warrant an attachment under this chapter, the defendant contends, that there must be an obligation existing, either to pay money, or growing out of a contract, the amount of which may be determined, either by the obligation itself, or from circumstances naturally flowing from the contract, upon which a jury may compute it. *Clark's Ex'rs v. Wilson*, 3 Wash. C. C. 560; *Hazard v. Jordan*, 12 Alabama, 180. The relation of creditor and debtor must exist. A liability merely in damages, where there is no debt, will not sustain an attachment. *Hazard v. Jordan*, 12 Alabama, 180; *Black v. Zacharie*, 3 How. 483. It will not apply to an action of trover (*Marshall v. White*, 8 Porter, 551; *Hynson v. Taylor*, 8 Arkansas, 552; *Hutchinson v. Lamb*, Braynton, 284); nor for a malicious prosecution (*Stanly v. Ogden*, 2 Root, 259); nor for an assault and battery (*Minga v. Zollicoffer*, 1 Iredell, 278); nor to recover the amount of expenses incurred for medical and surgical services, and loss of time, resulting from a wound inflicted by defendant (*Prewitt v. Carmichael*, 2 Louisiana Annl.); nor for damages sustained by plaintiff, through a wrongful sale of property upon execution (*Griener v. Prendergast*, 3 Louisiana, 376); nor for a collision between steamboats (*Swager v. Pierce*, 3 Louisiana, 435); nor for damages sustained by a steamer running into, and destroying a house (*Holmes v. Barclay*, 4 Louisiana Annl. 63; *McDonald v. Forsyth*, 13 Missouri, 549); nor to recover of common carriers, damages for loss of trunk, where declaration is in tort, and not in contract (*Porter v. Hildebrand*, 14 Penn. 129); nor in an action on the case, for money of the plaintiff, stolen by defendant (*Piscataqua Bank v. Turnley*,

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1 Miles, 812). From these authorities, it is obvious, that there must be something more than the inchoate right to claim damages, to constitute a cause of action upon which an attachment may issue.

These decisions have been made in the courts of states, where the language of the statutes relating to attachments, is as comprehensive as in Iowa. In New York and Ohio, we find the same phraseology as in this state, and in the statute of the latter state (Ohio), the legislature, in subdivision nine of their act, expressly declare that the writ shall issue in demands arising upon contract and judgment, seemingly distinguishing between the two. In Delaware, North Carolina, Arkansas, Texas, Illinois, Louisiana, Maryland, and Missouri, the language of their acts is, either "justly indebted" or "indebted." In Virginia, it is, "debt or damages for breach of any contract;" and in most of the other states, the relation of creditor and debtor, is obviously contemplated. It will be apparent, therefore, that the scope of the statutes of the various states, providing this remedy (attachment), is merely to secure an indebtedness, and not to avenge a wrong. *Sargeant v. Helmbold*, Harper (S. C.), 219; *Besley v. Palmer*, 1 Hill, 482; *Hynson v. Taylor*, 3 Pike, 552.

Although all forms of action are abolished in the state of Iowa, this change operates merely upon the mode of enforcing a right, but does not change the right itself. Judging from the nature of this writ, the purpose for which it was applied, previous to the Code, and in the absence of any intimation that it would be extended in its operation, it cannot be supposed that the legislature intended it should be made use of in cases of tort. At common law, the writ of replevin issued, in the first place, for the restitution of the goods wrongfully taken, with damages for the detention. In Illinois, it lays for the wrongful taking or detention of goods and chattels, and judgment is for damages for the detention. The action does not grow out of contract, and even if it did, the form of action would determine the remedy. *Porter et al. v. Hildebrand*, 14 Penn. 129. The defendant, therefore,

insists, that actions for torts are not within the scope of these statutes relating to attachments; that replevin is an action of mere tort; and that, even were it not, the form of action adopted in Illinois, would be conclusive upon the courts of this state, that the judgment was recovered for a tort.

But it will be urged on the part of the plaintiff, that the claim in this suit, is a judgment of a sister state, and imports, or is, a contract; that the subject matter of the original suit is merged; and that the courts of this state cannot look into the record to ascertain the original cause of action. Passing by, for the present, the question, whether a judgment is a contract or not, the question of the right of the courts of this state, when applying the statutory remedies, to look into the record, presents itself. First, let us look at the consequences of this doctrine: A judgment for assault being recovered in an inferior court of this state, might be sued upon in a higher court, and the plaintiff would then be entitled to a remedy denied him in the original action. Would the court, in such a case, feel itself bound to issue the writ, although the judgment record disclosed a state of facts which would not warrant it, if the suit had been originally instituted before it. And why should it not be equally bound by the judgment of a court of our own state, as by that of a court of another state? Suppose the judgment to be recovered in a court of record of this state, would it not be equally conclusive upon the merits, as a foreign judgment, and would not the defence be equally limited?

As between different states, judgments of competent courts, having obtained jurisdiction, it is admitted, are conclusive evidence of the issues they are composed of. The record establishes a determination of those issues for the court, and in an action of tort, is merely evidence that the plaintiff has recovered a verdict of certain damages. To use the phrase, often adopted by the reports, "a judgment is evidence of indebtedness," but for the nature of that indebtedness, the original cause of action is the only test. Courts are not precluded from inquiring into the circumstances which produced the judgment; they are merely prohib-

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ited from questioning them, as certified in the record. The courts of each state, are the sole judges of the remedy. They are to apply it, and as a general rule, in special proceedings, it is incumbent, as a condition precedent, that the plaintiff shall show those facts to exist, which will entitle him to the process. In a proceeding of this nature, they must be satisfied, that there is a contract, under one section of the statute; that it is capable of being liquidated; and in the other, that there is a debt or liability, and the test of damages. A contract might be shown, and the measure of damages lost *Clark's Executors v. Wilson*, 3 Wash. C. C. 560. But in *Evans v. Sprigg*, 2 Md. 457, the court say: "That a judgment is to some purposes, a merger of the original contract, and constitutes a new debt, yet when the essential rights of the parties are influenced by the nature of the original contract, the court will look into the judgment, for the purpose of ascertaining what the original contract was."

But is a judgment a contract? In the case of *Bidleson v. Whytel*, 3 Burrow, 1545, upon a writ of error brought upon an action of debt on a judgment, it was held, under the statute of 3 James I, c. 1, in regard to holding to bail: "1. That the *contract* is extinguished by the first judgment; 2. That a *judgment* is no contract, nor can be considered in the light of a contract; 3. Another reason why bail cannot be insisted upon is, that an action of debt upon a *judgment*, is an action of a *superior nature* to an action of debt upon bond, or any of the other actions particularly specified in this statute of 3 James I; and, therefore, shall not be included in it, agreeably to the reasoning used in *Archbishop of Canterbury's Case*, 2 Rep. 466: 'That if the makers of the statute had *intended*, that it should have extended to this action of a superior nature, in addition to those which are specified in it, they would have *begun* with it, and would have mentioned it, *prior* to those of an inferior nature.' Another reason is, that this statute ought rather to be taken *literally*, than extended." In *Trinder v. Watson et al.*, 3 Burrow, 1567, Lord MANSFIELD says: "That these cases ought to be *liberally construed*, as they arise upon *remedial*

laws. But, that in the case of *Bidleson v. Whytel*, it appeared, that the determination had been otherwise; and we must not depart from settled determinations." In that case, the weight of authorities prevailed.

The only case besides this, which has been found by the counsel of the defendant, is a modern western case — *Williams v. Waldo*, 8 Scammon, 268. Judge BREEZE, delivering the opinion of the court, says: "A decree or judgment at law, is *not* a contract. Contracts are made between the willing—judgments and decrees are rendered against the unwilling, and they extinguish the contract." In 2 American Leading Cases, 744; in *Mills v. Durye*, the court say: "The true rule on this point, was stated very clearly in the recent case of *Napier v. Gedere*, 1 Speer's Equity, 214, where it was held, that 'the original cause of action here, was contract, but it is no longer so; it has passed into a judgment, and that it is the foundation of the action, and therefore not embraced in our statute; whatever may have been the original cause of action, it is merged in the judgment, as effectually so, as if a bond or other specialty had been given for a simple contract debt. It has assumed a new form, and a name not found in our statute.'" The same ground was taken by the Supreme Court of Pennsylvania, in *Coll's Estate*, 4 W. & S. 514, where it was decided, that a debt that had passed into a judgment in another state, is no longer a debt due by simple contract, and is entitled to a preference under a statute giving judgments a priority in the distribution of assets. See, also, *Eaton v. Smith*, 8 S. & R. 243; *Wilson v. Long*, 12 Ib. 58; *Zeigler v. Cram*, 13 Ib. 102; *Schaffer v. McNamee*, 13 Ib. 47.

The counsel also refer to the unreported case of *Reed v. Jamieson*, in the Supreme Court of Iowa, confirmed by the Supreme Court of the United States, in which it was held, that a judgment was not a contract. The counsel for the defendant insists, also, that this judgment is not a demand founded on contract, as required by section 1849 of the act: 1. Because the present plaintiffs are only assignees of the judgment; and 2. Because the act, by its first section, in the

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words, "for the recovery of money," was intended to include all the causes of action of that nature. The words, "founded on contract," are words of specification and limitation, and apply only to demands founded on contract, used in a strict sense, else they are surplusage. The judgment of a court may be a debt, and the effect of it is, that the defendant is obliged to pay it. This liability may arise from the cause of action, which is merged; but, again, it may arise as a liability growing out of the judgment. In an action of assumpsit, the judgment is, that the defendant promised, and therefore, it is adjudged. In replevin, it is, that he is "guilty," and, therefore, the plaintiff shall recover. Does it, therefore, follow that the demands in both cases, because converted into a judgment, are founded on a contract? Blackstone defines a contract: "An executory contract, is an agreement of two or more persons, upon sufficient consideration, to do, or not to do, a particular thing." The Code Napoleon defines it: "An agreement, by which one or more persons bind themselves to one or more others, to give, to do, or not to do, something." C. J. MARSHALL defines it thus: "It is an agreement, in which a party undertakes to do, or not to do, a particular thing."

WOODWARD, J.—The errors assigned are: 1. In dismissing the attachment. 2. In sustaining the motion for the production of the paper mentioned in the statement, and rendering judgment against the plaintiffs, upon its non-production. Section 1846 of the Code provides, that, "in an action for the recovery of money, the plaintiff may cause property of the defendant" to be attached, upon filing an affidavit or petition therefor, stating some one of certain facts, one of which is, that the defendant is a non-resident of the state. By section 1849: "If the plaintiffs' demand is founded on contract, the petition must state that something is due," &c. By section 1850: "The amount thus sworn to, is intended as a guide to the sheriff," &c. By section 1851: "If the demand is not founded on contract, the original petition must be presented to some judge of the Supreme or District

Court, who shall make an allowance thereon of the amount in value of the property, that may be attached." The provisions of these sections were intended to draw the line between actions *ex contractu* and *ex delicto*?

In the act of February 16th, 1848 (Stat. 1848, 78), the language is, "that when any action founded on contract," is commenced, and section 3 says: "The said writ may also be issued in actions *ex delicto*, in cases where," &c. Here the distinction intended, is manifestly between actions *ex contractu* and *ex delicto*; and it was always so understood, and so practiced upon. Numerous attachments have been sued out in actions brought upon judgments recovered in this or other states, and no one has so far doubted the correctness of the proceeding, as to object to it upon this ground.

The Code does not recognize the common law, technical names of actions, nor, in this case, even the general classification of those upon contract, and those of tort, in express and technical terms; still the sense cannot be mistaken. The language of section 1849, is not "founded upon a contract," but is general, upon contract, making a class, whilst section 1851, in the words "not founded on contract," refers to the class of actions for torts. The sense of this, and that of the former law, are the same; intending, that if the cause of action were such as to furnish some definite criterion of amount, such as is found in what are commonly called debts, this should form the guide for the attachment. And this class furnishes another important element, also—the fair assurance that something is due; whilst, on the other hand, all of that class which rests in damages alone, purely and strictly as damages, and not at all as debts, and which are altogether uncertain and unfixed, until ascertained by a verdict and judgment, require a special allowance.

But when a judgment has been recovered for a tort, it then is fixed and certain. It is a debt, as much as if it were recovered upon a promise; and an action of debt, under the former practice, brought upon such a judgment, was an action *ex contractu*. It is so classed by all the writers. Who ever heard of an action of debt upon a judgment, called an ac-

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tion *ex delicto*? And yet it must be that, if it be not *ex contractu*, for there are but these two general classes. And we do not look back, for this purpose, to see upon what the judgment was recovered.

It certainly was not necessary for the defendant, to labor to prove that a judgment is not a contract, in the narrow sense, and as synonymous with *agreement*. But that it is, in a broader sense, and as distinguished from a *tort*, see the authorities cited by the plaintiff's counsel. The only answer to be made to a part of defendant's argument, is by asking whether this is not an action for the recovery of money? whether under this judgment, there is not "an obligation existing to pay money?" whether the relation of debtor and creditor does not exist? and what can create it more effectually, than a judgment? It is true enough, that these qualities do not exist in, and this section cannot apply to, actions of trespass, trover, malicious prosecution, and case generally, and that there must be something more than the "inchoate right to claim damages." The action does not stand in these categories. There is a *judgment*, and thereby a *perfect* right. The counsel dwells too much on the original cause of action, and forgets his own argument, that it is merged in the judgment. There is no absurdity in supposing, that an attachment might be sued out in an action on a judgment recovered in trespass, although it might not in the original action. In conclusion, we feel clear that the intent of the Code, like that of our former laws, is to distinguish between those demands which are *ex delicto*, and totally uncertain and indefinite, and those which are classed as *ex contractu*, and contain in themselves, something specific as to the amount, and we think the court erred in quashing the attachment.

The next matter for consideration arises upon the defendant's motion, that the plaintiffs "be ruled to complete the record and proceedings, upon which this suit is brought, by filing a certified copy of the *exceptions*, upon which, as appears by the record, the Supreme Court of the state of Illinois, reversed the judgment obtained in the Circuit

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Court," which motion was sustained, and, the paper not being produced, the action was dismissed.

It may be doubted whether an affidavit is requisite, when the record shows the former existence of a paper; but we apprehend that it is necessary, when the record does not thus show it. By this record, it does not appear that such a paper existed. No bill of exceptions appears to have been taken, and still less does it appear *by the record*, upon what the Supreme Court reversed the judgment of the Circuit Court. But setting criticism aside, and assuming that the defendant aimed at the motion in Illinois, to set aside the verdict, the question is, had he a right to demand the paper, *at all events*? He says he could not know how to conduct his defence, "without knowing the reasons which influenced the Supreme Court of Illinois, in reversing the first decision of the Circuit Court in Jo Daviess county." That motion could not, with any certainty, give him those reasons. If he needed them, the *opinion* of the court was the only thing which would furnish them, and this he could obtain. We can see no reason why the motion should have been withdrawn, but we are at an equal loss to perceive, what right the defendant has to call for it, in this manner, or of what use it could be to him in his defence. The opinion of the Supreme Court is what he wanted, if he needed anything pertaining to that matter. But the weightier answer, lies in a different train of thought. Can a state of things be conceived, in which the defendant *here*, could plead *any matter* which might be contained in that motion, or those exceptions? He does not show any bearing which they may possibly have had, and the defendant must have some knowledge of their nature, at least. But it must be remembered, that this is an action brought upon a judgment recovered in another state. The defendant cannot make a defence of any matter, which he might have pleaded in the former suit. Whatever objection there was to the former verdict and judgment, went up to the Supreme Court of Illinois, and that judgment was reversed; and this action is brought upon a judgment recovered after that.

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Again: may not the plaintiff bring his action upon an incomplete record, as, for instance, upon a transcript of the judgment only (*Latterett v. Cook*, 1 Iowa, 1); or upon so much of the record as to show only, that the court had jurisdiction of the person and matter, and that a judgment was rendered? It is much to be doubted, whether the defendant could compel him to produce the remainder of the record, or a copy of it. The defendant could plead any of the pleas permitted in such case, and thus, perhaps, compel the plaintiff to show the rest of the record, as a matter of evidence. Thus, the defendant could plead *nul tiel record*; or, perhaps, that the court had not jurisdiction of the person or matter; or, that defendant was not served, and did not appear; or, that the judgment was obtained by fraud; and thus he might render it necessary for the plaintiff to produce other parts, and even the whole, of the record. The plaintiff can, by pleading, be compelled to show enough to prove a valid judgment recovered; but we cannot see that he can, by motion, be obliged to produce any particular part of the record. And it would seem, that additional weight is given to this reasoning, in this case, in view of the fact, that the former court permitted the paper called for, to be withdrawn from the records, so that it is no longer a part of them. If there were error in this, it should have been corrected in the other jurisdiction. The court here cannot correct it. Neither can our court make any inference adverse to the plaintiff.

Upon the whole, we are of the opinion, that the District Court erred in sustaining this motion, and in dismissing the action. The judgment will, therefore, be reversed, and a writ of *procedendo* will issue.

THE STATE OF IOWA v. JOHNSON.

A writ of error on the part of the state, cannot be sued out in a criminal case.

Error to the Scott District Court.

THE defendant was indicted at the the May term, A. D. 1856, of the District Court for Scott county, for maliciously killing an ox. On arraignment, he pleaded not guilty; and on trial was acquitted by the jury. During the progress of the cause, the prosecuting attorney excepted to the instructions given by the court to the jury, at the request of defendant, and a bill of exceptions was signed, and made part of the record.

The prosecuting attorney sued out a writ of error, and has brought the cause to this court for revision. The counsel for defendant, moves the court to dismiss the writ of error, for the following reasons:

1. The defendant having been in the court below, tried and acquitted, this court has no jurisdiction.
2. Should a new trial be awarded, the order will be nugatory; the defendant having been once tried and acquitted, cannot be tried the second time for the same offence.

Cook & Dillon, for the state.

Whitaker & Grant, for the defendant.

STOCKTON, J.—We are of opinion that the motion of the defendant, must be granted, and the writ of error dismissed. The question is one simply as to the power and jurisdiction of this court. The writ of error is given to the defendant in criminal cases (Code, § 3089), but not to the state. It is true, as argued by the counsel for the state, that the prosecuting attorney may take a bill of exceptions to the decisions of the court, upon matters of law arising during the

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trial (Code, § 3046), but the legislature has omitted, if it ever intended, to make provision for a writ of error on the part of the state. This omission it is not in our power to supply. We do not feel authorized to infer that the writ was given to the state, by the section allowing the prosecuting attorney to except to the decision of the court; nor by the language of chapter 184, concerning writs of error. *The State v. Douglass*, 1 G. Greene, 550, was a writ of error on behalf of the state. A motion was in that case made to dismiss the writ of error, on the ground that no such writ would lie in a criminal cause, but the motion was overruled, because the statute (Act of 1844, § 6, p. 6) placed the matter beyond question, and expressly allowed the writ on the part of the prosecution. This act has, however, been repealed, and since the adoption of the Code, no such writ has been allowed to the state.

We do not express any opinion on the question, raised in the argument by the counsel, whether an order by this court, for a new trial in a criminal case, would be nugatory, in virtue of article 1, section 12, of the constitution of Iowa, after defendant has been once tried and acquitted. We only decide, that there being no law to authorize a writ of error on the part of the state, in a criminal case, the motion to dismiss the writ of error in this case must be sustained.

SKIFF v. THE STATE OF IOWA.

Ordinarily, the presumption is in favor of the regularity of the proceedings of the District Court, and that such court had (where the contrary is not shown), sufficient evidence to justify the judgment rendered.

In cases of contempt, however, the provision of the Code is positive, that where the action of the court is founded upon evidence given by others, the evidence must be reduced to writing, and be filed and preserved; and where the court acts upon its own knowledge, a statement of the facts, must be entered upon the record.

The power to punish for contempt is a necessary one, but at the same time,

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should be carefully exercised, in strict accordance with law, and a due regard for the rights of those charged.

Where the only record in a case of contempt, was the following: "Harvey J. Skiff fined for contempt of court, fifty dollars. For a second contempt, one hundred dollars, and ordered to be committed to jail for three days. Mittimus issued to sheriff of Polk county, to confine said H. J. Skiff in the jail of said county for three days," the party was discharged from custody and from the fines adjudged against him.

Certiorari to the Jasper District Court.

THE plaintiff in error, having been fined and ordered to be imprisoned, for an alleged contempt, he brings the proceedings before us for revision, by *certiorari*, under section 1606 of the Code. The clerk of the Jasper county District Court certifies, that the following is "a full and true transcript of the record of said court" in said cause:

"Harvey J. Skiff fined for contempt of court, fifty dollars. For a second contempt, fined one hundred dollars, and ordered to be committed to jail for three days. Mittimus issued to sheriff of Polk county, to confine said H. J. Skiff in the jail of said county for three days."

C. Bates, for the plaintiff.

Clarke & Henley (for the attorney-general), for the state.

WRIGHT, C. J.—We shall notice but one of the several grounds urged for the discharge of the plaintiff in error. Our Code, chapter 94, after specifying what acts or omissions, shall be deemed contempts, and for their punishment, provides, section 1604, that where the action of the court, in such cases, is founded upon evidence given by others, such evidence must be reduced to writing, and be filed and preserved; and if the court act upon their own knowledge in the premises, a statement of the facts upon which the order is founded, must be entered on the records of the court, or be filed and preserved, when the court keeps no record. In this case, there is nothing to disclose whether the court acted

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upon evidence given by others, or upon their own knowledge. Nor is it material, for in either event, the facts or evidence upon which the court acted, must be preserved and shown. Ordinarily, it is true, the presumption is in favor of the regularity of the proceedings of the District Court, and that such court had (when the contrary is not shown) sufficient evidence to justify the judgment rendered. In cases of contempt, however, the provision of the Code is positive, that the evidence in the one case, and the facts in the other, shall be filed and preserved, or entered on the record. The power to punish for contempt, is a necessary one, but at the same time it should be carefully exercised, in strict accordance with law, and a due regard to the rights of those charged. To fine and imprison the citizen, upon a record so barren and destitute of every legal requisite as the one before us, cannot be tolerated in this country, where liberty and property are justly held so sacred. We see no cause for holding the person charged further liable, and he is discharged from custody, as also from the fines adjudged against him.

CORRIELL v. HAM.

Where there is no express declaration in a will, barring the wife of dower, the intention to so bar her, must be deduced by clear and manifest implication from the instrument, founded on the fact that the claim of dower would be inconsistent with the will, or so repugnant to its dispositions, as to disturb and defeat them.

The claim for dower, to be inconsistent with the will, must defeat, or interrupt, or disappoint some of its provisions.

Where a husband devised to his wife, during her natural life, and so long as she remained unmarried, &c., all his real and personal property; and where the wife, subsequently to the death of her husband, claimed her dower in certain real estate of her husband, sold on execution against him, previous to his death, to which she had not released her dower;

Held, 1. That the claim for dower, so far from disappointing or interfering with the will, harmonized with it, and went to the same end.

2. That even if the wife had claimed the property under the will, she could not be bound by its provisions, if there was no title in her husband.

2	552
90	540
2	552
91	145
2	552
95	732
2	552
d129	603

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3. That if the title in the husband failed, the wife was remitted to her right of dower.

Section 1407 of the Code, has no application to such a case.

In November, 1842, W. W. C. was seized in fee simple absolute of certain real estate, which was sold on execution against him, and purchased by defendant, who received a sheriff's deed therefor, on the 24th day of August, 1844. On November 26, 1844, W. W. C. executed to A. C. a general power of attorney to sell lots and make conveyances, which was recorded April 12, 1843, on the back of which was the following, signed and sealed, by the wife of the said W. W. C.: "Know all men by these presents, that I, O. C., wife of W. W. C., the grantor in the within power of attorney, for the purpose of enabling A. C. more fully to carry into effect the authority therein to him granted, do hereby remise, release, and quit claim, unto any person or persons, their heirs and assigns, to whom the said attorney so constituted, shall convey the land and premises in the said letter of attorney mentioned, all my right, title, interest, claim, and demand, to said land," which bears date, November 26, 1842, and the certificate of acknowledgment to which, is as follows: "On the 26th day of November, 1842, before me, G. L. N., a justice of the peace in and for said county, came O. C., wife of W. W. C., and on examination, separate and apart from her husband, acknowledged that she executed the above instrument freely and voluntarily, without threat or compulsion of her said husband." No conveyance was made under the power of attorney. On the 13th of October, 1845, W. W. C. conveyed the premises, by deed of general warranty, to A. C., in which deed the said wife did not join, and which was recorded November 13, 1845. On the 2d of February, 1846, A. C. mortgaged said premises to E. C., which was filed for record, April 8, 1856; and on the 8th of April, 1846, said A. C. conveyed to E. C. the equity of redemption in said premises, which was recorded June 1, 1846. On September 26, 1845, A. C. conveyed said premises, by general warranty, but to whom is not stated, which conveyance was filed for record December 6, 1851; and on September 20, 1848, E. C. conveyed all of said premises to O. C., the wife, which deed was filed for record, October 23, 1851. W. W. C. died April 28, 1854.

- Held*, 1. That as A. C. did not make any conveyance under the letter of attorney, and none till after W. W. C. conveyed to A. C., in which deed the wife did not join, and as the deed from A. C. to E. C. was made in his own right, there was no release of the wife's interest in the premises.
2. That the deed from E. C. to the wife, conveyed no title, for the reason that W. W. C. had no title when he conveyed to A. C. who subsequently conveyed to E. C.
3. That the defendant, by his purchase under the execution, took the title of W. W. C.

Appeal from the Dubuque District Court.

THIS is an action to recover dower in lots number 275,

352, 379, and 346, in the city of Dubuque, which dower the plaintiff claims as the widow of William W. Corriell. The defendant denies the plaintiff's right to dower in the premises :

First. Because the lots were sold under executions issued upon a judgment recovered against her husband, and were purchased by the defendant, and duly conveyed by the sheriff, and never redeemed.

Second. Because, by her release, in writing, to one Augustus Corriell, duly recorded, she expressly relinquished such right of dower to any person to whom said Augustus should convey, and he did thereafter convey to one Edwin Corriell.

Third. Because the said W. W. Corriell, by his last will and testament, made provision for the plaintiff, in lieu of dower, the benefit of which provision she claims, and has received, since his decease, and is still receiving; and that the provisions of said will, which she is enjoying, and having the full benefit of, are inconsistent with a dower right, and plainly show an intention that the same shall be in lieu of dower.

This is an agreed case, and the above matters of defence are set forth, in the language of counsel substantially, and stand for formal pleadings. It is agreed that the said William W. and Charlotte were married, prior to November, A. D. 1842, and continued to be husband and wife until his death, on 28th April, 1854; that she has remained unmarried since his death, to this time; that in November, 1842, the said W. W. Corriell was seized, in fee simple absolute, of lots number 275, 352, 379, 746, and 320, in the then town, now city, of Dubuque, Iowa; that the above lots were afterwards sold to the said Mathias Ham, under an execution issued on a judgment rendered against the said Corriell, in the District Court of Iowa, sitting in Dubuque county, at the November term, 1842; that the sheriff of said county executed to said Ham, a deed therefor, on the 24th August, 1844, which was duly recorded; that the said W. W. Corriell, on the 26th of November, 1842, made and acknowl-

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edged a power of attorney to Augustus Corriell, which was a general power to sell lots, and make conveyances, &c., and was filed for record on the 12th of April, 1843. On the back of which said power, is the following: "Know all men by these presents, that I, Charlotte Corriell, wife of William W. Corriell, the grantor in the within power of attorney mentioned, for the purpose of enabling Augustus Corriell more fully to carry into effect the authority therein to him granted, do hereby remise, release, and quit claim, unto any person, or persons, their heirs and assigns, to whom the said attorney, so constituted, shall convey the lands and premises in the said letter of attorney mentioned, all my right, title, interest, claim, and demand to said land. In testimony whereof, I have hereunto set my hand and seal, this 26th day of November, A. D. 1842," which is signed and sealed, and witnessed, and acknowledged in the following form: "On the 26th day of November, A. D. 1842, before me, George L. Nightengale, a justice of the peace in and for said county, came Charlotte Corriell, wife of William W. Corriell, and on examination, separate and apart from her husband, acknowledged that she executed the above instrument, freely and voluntarily, without threat or compulsion of her said husband;" that on the 13th of October, 1845, W. W. Corriell conveyed all of said lots to Augustus Corriell, by deed of general warranty, in which the said Charlotte did not join; that this deed was filed for record November 18th, 1845; that on the 2d of February, 1846, the said Augustus mortgaged all said lots to Edwin Corriell, which mortgage was filed for record April 8th, 1846, and on the 8th of April, 1846, said Augustus conveyed to said Edwin, the equity of redemption in the same lots, which conveyance was filed for record on the 1st of June, 1846; that on the 26th of September, 1845, said Augustus conveyed, by general warranty, said lots Nos. 275, 379, and 320, which conveyance was filed for record on the 6th of December, 1851; and that on the 20th of September, 1848, Edwin Corriell, conveyed by deed of general warranty, to the said Charlotte, all of said lots, which deed was filed for record on the 23d of October, 1851.

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The will of William W. Corriell, is among the agreed facts. It is very brief, consisting of but twenty-four lines, all told; and the whole of it relating to the disposition of his property, is in these words: "I give and bequeath unto my beloved wife, Charlotte, during her natural life, and so long as she remains unmarried, all my property, real and personal, and desire that she use the same for the maintenance of herself and our children, and for the education of our children. In the event of my wife, Charlotte, marrying again, then I restrict her interest and share in my property, both personal and real, to her legal right of dower." This was made the 27th April, 1854, and is admitted to have been proved. In the District Court, judgment was rendered in favor of defendant, and the plaintiff appeals.

Smith, McKinlay & Poor, for the appellant.

Burt & Barker, for the appellee.

WOODWARD, J.—The objection, which rested upon the supposed release by the widow, seems to be abandoned in the argument, since in that the two other points only are pressed. But lest there should be any misconception, and as one or two other causes are made to depend upon this one, the point may be disposed of. To this objection to her claim, it is answered, on the other side, that the certificate of acknowledgment is insufficient, inasmuch as the justice does not certify to a personal knowledge of her, nor to her identity being proved, nor that the contents were made known to her. Viewed as a release, it admits of a serious doubt, whether it is valid, for the want of a releasee or grantee. Perhaps the only light in which it could be made available, would be to regard it (if possible) as a power to execute the deed for the wife, and relinquish her dower. But the view of this paper, which absorbs the others, is, that Augustus Corriell did make any conveyance under this power. He made none till after William had conveyed to him; and then he made that to Edwin, in his own right, and

not by virtue of the power. So stands the case, and Charlotte, the plaintiff, did not execute that deed from her husband to Augustus, so that there is no release of her interest.

Another point made by the defendant is, that the plaintiff holds the fee simple title by the conveyance from Edwin, and that this merges the claim for dower, and that, therefore, the claim for the latter is inconsistent. The error in this point is, in assuming that she has a title through Edwin, and the defendant is guilty of the inconsistency of setting up against her, a title which, he says, has no validity against him. He would estop her, because she took a title from Edwin. He says, she cannot deny the validity of that title. Undoubtedly, her dower would be merged, if she had the fee simple; and, in that case, she would have no need to claim dower, and she would not be here asking it. But the fact is, that she took no title from Edwin, for he had none, William having none when he conveyed to Augustus. The defendant's purchase, under the judgment, took it away. And we should be very reluctant to decide that, because she undertook to obtain, and thought she was obtaining, a title from Edwin, she is estopped from saying it is no title; or, in other words, that she cannot claim her dower, when that proves to be invalid, and no title. As the law of dower then stood, the widow was not to be cut off but by her own voluntary act, and certainly, her supposition that she was obtaining the fee, is not to be construed as a relinquishment of dower, when she fails of the fee.

The other objection made by the defendant to the plaintiff's recovery, rests upon the provisions made for the widow, by the will of her husband. He states the general principle to be, that dower is barred by a testamentary devise accepted. He states the rule in the following terms: "In deciding the question, whether a devise bars dower or not, in any particular case, courts will examine, first, to see if the will directly expresses such to be the intent of the devisor in making the devise; and secondly, if there is no declaration of such intent, whether such intent can be fairly in-

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ferred to have existed, from the inconsistency of supporting both estates." This, although not quite accurate, will do for this case. Chancellor KENT (4 Comm. 58, 8d ed.), says, that, when there is no express declaration, the intention must be deduced, by clear and manifest implication, from the will, founded on the fact that the claim of dower would be inconsistent with the will, or so repugnant to its dispositions, as to disturb and defeat them. This seems to be the result of the cases; and he cites the following authorities: *French v. Davies*, 2 Ves. 572; *Strahan v. Sutton*, 3 Ib. 249; *Kennedy v. Nedrow*, 1 Dal. 415; *Adsit v. Adsit*, 2 Johns. C. 448; *Jackson v. Churchill*, 7 Cow. 287; *Pickett v. Peary*, 2 Const. 746; *Evans v. Webb*, 1 Yeates, 424; *Perkins v. Little*, 1 Greenl. 150; *Dickson v. Robinson*, 1 Jacob, 503. To which may be added, *Cauffman v. Cauffman*, 17 S. & R. 16; *Duncan v. Duncan*, 2 Yeates, 305; *Reed v. Dickerman*, 12 Pick. 151; *Hamilton v. Buckwalter*, 2 Yeates, 389; *Church v. Ball*, 2 Denio, 430; *Beardsley v. Beardsley*, 5 Barb. 324; *Willis v. Watson*, 4 Scam. 65. This inconsistency means an incompatibility. The claim of dower must defeat, or interrupt, or disappoint, some provision of the will.

But so far is the claim in this cause, from disappointing or interfering with the will, that it perfectly harmonizes with it; it goes to the same end. The will intends to give her all the estate; and if there be anything which the testator cannot give her by his will, but which she is entitled to as dower, there is certainly no inconsistency with the will, in her claiming it. Nor is there any inconsistency with the condition, that she remains a widow, and that if she does not, she shall be restricted to her dower interest. That condition not complied with, would leave her even more free, if possible, to claim for dower. Ham does not take under the will, but, in effect, against it, and he is not disturbed by her taking under it. There would be an inconsistency in claiming the same property, both by the will and by dower right. But she does not claim the interest in these lots, by virtue of the will. By the devise, the husband gives her all he has remaining. She then comes and claims her dower

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right in some other property, which had formerly been taken from him by judicial sale, her right in which she had not released. There is no inconsistency in this—no conflict.

The agreed facts do not show, that the widow holds any other property than the interest in the lots which were sold under execution. The case is left blind on this matter. But the argument of plaintiff assumes or admits, that she does, and we have considered it under that supposition. The provision of section 1407 of the Code has no application.

Finally, even if the plaintiff had claimed this property under the will, it is presumed that she could not be barred by its provisions, when the result shows that there is no title in her husband. The whole doctrine, upon which the defendant bases himself, in relation to the will, assumes that there is a title in the testator. But if this fails, she is remitted to her right of dower. 2 Bouv. Inst. 248; *Kidney v. Coussnaked*, 12 Ves. 143; *Larrabee et ux. v. Vanalstyne*, 1 Johns. 307, cited in 7 Cow. 289, and the cases before cited.

The judgment of the District Court is reversed, and a writ of *procedendo* is awarded.

THE STATE OF IOWA v. FOSTER.

Chapter 124 of the Code, refers to civil cases, or applications to revive judgments; and chapter 198 has reference to forfeited recognizances in criminal cases.

In *scire facias* on a forfeited recognizance, no petition is necessary. The record on which the writ is based, stands in the place of a petition.

The record is an entirety, and must all be taken together, and when so considered, must show the right of the state to have the recognizance estreated; but all these things need not appear in the *scire facias*.

Where the record contained a demurrer to an answer, and a replication, but no answer was found in, or otherwise referred to by, the record; *Held*, That the evidence was insufficient to warrant the appellate court in holding that the defendants did answer in the court below.

Where a *scire facias* on a forfeited recognizance, recited that the recognizance

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was entered into on the 13th of September, 1854: that the person charged was in custody of the sheriff of Davis county (in which county the indictment was found); that he and his surety entered into an obligation in open court, conditioned that the principal should appear at the next term of the District Court of Appanoose county, Iowa, it being the September term of said court, to answer to said charge contained in the indictment; and that at the said September term, to wit: on the 19th day of September, 1854, the said principal was duly called as the law requires, and made default; *Held*, That the writ contained sufficient to entitle the state to a judgment.

Appeal from the Appanoose District Court.

SCIRE FACIAS. To the writ, there is a demurrer, which was overruled, and defendants failing to answer over, judgment was entered for the amount of the recognizance against the defendants. The record also shows a demurrer to an answer, and a replication, but no answer is before us, or otherwise referred to in the record,

Palmer & Trimble, for the appellant.

Clarke & Henley (for the attorney general), for the state.

WRIGHT, C. J.—It is first claimed by the state, that the assumed answer, waived the demurrer filed by defendant. To sustain this position, we should want more evidence than is now before us, that defendants did answer. It would be an unsafe rule to say, that a defendant waives a demurrer by answering, when the only evidence of the existence of such an answer, is, that a plaintiff demurs and replies to an answer that does not appear to have ever been made or filed. If this was the rule, a plaintiff could, by his own pleading, always make a defendant waive his demurrer.

We have examined the demurrer to the *scire facias*, however, and conclude that it was properly overruled. This *scire facias* was sued out under chapter 198 of the Code, and not under chapter 124, as appears to be assumed by the defendants. The latter chapter, refers to civil cases or applications to revive judgments; the former, to forfeited recognizances in criminal cases. The writ, in this case, is not, it

is true, the most formal in all its parts—but taken as true (as it is by the demurrer), we think, it contains sufficient to entitle the state to a judgment. Most of the defendant's argument, is based upon a misconception of what is contained in the writ, and a wrong impression of the law applicable thereto. It is urged, for instance, that the *scire facias* does not show that the principal in the undertaking, was bound to answer at the September term, 1854, of the Appanoose District Court. The writ does state, however, that the person charged was in the custody of an officer (the proper sheriff), and that he and his surety entered into obligation in open court, conditioned that the principal should "appear at the next term of the District Court of Appanoose county, Iowa, it being the September term of said court, to answer to said charge, &c.," and then proceeds to state, that at the said September term, to wit: on the 19th of Sept., 1854, the said principal (John Foster) was called, and made default. It also alleges, that the recognizance was entered into in the Davis county District Court, on the 15th of September, 1854. Taking these allegations together, the only fair conclusion is, that the person charged was to appear at the next term of the Appanoose District Court, to wit, September term, 1854, and especially so, when by reference to the law fixing the time of that court, of which courts will take judicial notice, the next term was to be so held in September.

Again, it must be remembered, that the record upon which said *scire facias* was based, stands in the place of a petition, and to that, reference might properly be had. No petition is necessary in such cases. *State v. Leighton et al.*

This record is an entirety, and must all be taken together; and when so considered, must show the right of the state to have the recognizance estreated. *State v. Gorley and Cloud*, 1 Iowa, 52. But all these things need not appear in the *scire facias*.

Judgment affirmed.

Gammell v. Potter.

GAMMELL v. POTTER.

The act authorizing the erection of mill dams, approved January 24, 1855, does not require that the petition for a writ of *ad quod damnum*, should be sworn to, and if the petition is signed by the counsel of the applicant, that is sufficient.

Notice of the application for the writ, with a copy of the petition, must be served upon the defendant, before the petition is filed; and proof of service, by affidavit, must be filed *with* the petition.

Where in a proceeding of *ad quod damnum*, the jury summoned by the sheriff, found that "the proposed dam will overflow twenty acres of the lands of the defendant; that by reason thereof, the said defendant will sustain damage to the amount of \$654, and do therefore appraise his damage at that amount; that the lands of no other person would be affected by said dam; and that no dwelling-house, out-house, garden, or orchard, of the said defendant, or any other person, would be overflowed, or injuriously affected thereby;" *Held*, That the inquisition was not only substantially, but technically and formally, correct.

Appeal from the Jackson District Court.

THE plaintiff filed his petition for a writ of *ad quod damnum*, to have the damage assessed which defendant would sustain, by reason of the erection of a mill dam contemplated by him on his own land—the erection of which would affect the lands of defendant. On the 18th of March, a copy of the petition was served on defendant. On the 14th, the petition was filed in the office of the clerk. The writ being issued, the jury summoned by the sheriff, found that "the proposed dam will overflow twenty acres of the land of said Daniel Potter, and that by reason thereof, the said Daniel Potter will sustain damage to the amount of \$654, and do therefore appraise his damage at that amount. They also found, that the lands of no other person would be affected by said dam; and that no dwelling-house, out-house, garden, or orchard of the said Potter, or any other person, would be overflowed or otherwise injuriously affected thereby. The inquisition being returned to the next term of the District Court, the defendant appeared and moved to dismiss

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the petition, and all subsequent proceedings based thereon, for the following reasons:

First. That the petition was neither signed nor sworn to by the plaintiff.

Second. That the writ was issued improvidently, and without authority, no notice having been served as required by law.

Third. That the inquisition is defective, inasmuch as it does not conform to the matter of said writ, and the requirements of the law.

The motion was sustained by the court, and the writ quashed and dismissed. To the decision of the court, plaintiff excepted, and on appeal to this court, assigns for error, that the District Court erred in sustaining defendant's motion to dismiss the petition, and quash the proceedings.

D. F. Spurr, for the appellant.

J. B. Booth, for the appellee.

STOCKTON, J.—We have carefully and attentively examined the record and proceedings in this cause, and are of opinion, that there was no good and sufficient cause for granting the motion of defendant to dismiss the plaintiff's petition, and quash the proceedings under it. The statute does not require that the petition should be sworn to, and it was sufficient that it was signed by the plaintiff's counsel. The notice was served on the 13th of March, and on the 14th, the petition, with the affidavit of service on defendant, was filed with the clerk. The statute requires that the proof of the service, shall be "filed with the petition" (act of 1855, § 2, 152). It could not be filed with the petition, unless the notice is served before the petition is filed. The objection of defendant is, that notice was served on him before the petition was filed with the clerk. We think the objection is not well founded, and should have been overruled by the court.

The next objection of defendant is, to the inquest of the

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jury—that it “does not conform to the matter of the writ, or the requisition of the law.”

The jury return, under oath, that they had viewed the lands proposed to be affected by the dam; that they find that the dam will overflow twenty acres of the land of defendant; and that by reason thereof, the defendant will sustain damage to the amount of \$654, and they therefore appraise his damage at that amount. They therefore find, in the language of the statute, that the lands of no other person will be affected by the dam, and that no dwelling-house, out-house, garden, or orchard, of defendant, or any other person, will be overflowed, or otherwise injuriously affected, by said dam. The defendant objects that the inquest of the jury, does not say how far the lands of defendant may be “affected” by the overflow. It is true, the jury do not say, in words, how the overflow will affect the land. This would be supererogatory. The statute requires them to examine the land, and appraise the damages of the proprietor of the land, proposed to be affected by the dam. This inquisition, in our opinion, is not only substantially, but technically and formally, correct. Any discussion must be about words only, and not about substance. We think the proceedings have been conducted, from the first to the last, with every requisite formality, and with strict regard to the rights of defendant. He had ten days’ notice, by copy of the petition—of the application for the writ. He had, further, ten days’ notice of the day fixed for the inquest by the jury, and, further, ten days’ notice of return of the inquisition to the District Court, and of the amount of damages awarded him, with a day in court to show cause, if any he could, why leave should not be granted by the court to plaintiff to build the dam. We think no good reason appears why the proceedings should not have been sustained, and defendant’s motion overruled. The judgment of the District Court will, therefore, be reversed, and the cause remanded for further proceedings, on the inquisition, as returned by the jury.

Purington v. Frank.

PURINGTON v. FRANK.

Causes are to be tried in the order of their commencement, and at the first term thereafter, unless reasonable cause for a continuance, or change of such order, be shown.

In determining applications of this character, much must necessarily be left to the discretion of the court, but that discretion should be governed and controlled by legal rules, and not arbitrarily, nor in violation of prescribed rules, or the manifest rights of parties.

Where both an action at law, and a proceeding in chancery, between the same parties, and about the same subject matter, is pending in the same court, it is not an improper exercise of discretion, to postpone the trial of that suit which depended upon strict legal right, until those equities which the defendant had been compelled to set up in a separate action, could be heard and determined.

In case of such postponement, however, the defendant should be required to prosecute his suit in equity, with diligence; and when he fails in this respect, the action at law might properly be tried.

Appeal from the Muscatine District Court.

FROM the record in this case, it appears that Purington brought an action of right against Frank, for certain real estate, situate in Muscatine county. To this action, the defendant answered, setting up, among other things, certain matters of an equitable character. To such portions of the answer, there was a demurrer, which was sustained. The defendant thereupon filed his bill in chancery, against the plaintiff, setting up these matters, and asking that the action at law might be enjoined until the determination of the said chancery cause. While this bill was so pending, the action at law was called for trial, whereupon the defendant moved that it be continued, until the said chancery cause should be first heard and determined, which motion was sustained, and the said cause continued. There is nothing to show, that a writ of injunction had been ordered as prayed for in said bill, nor is said bill a part of the record. The order of the court continuing said cause, is the error now complained of by appellant.

Purinton v. Frank.

Stephen Whicher, for the appellant.

D. C. Cloud, for the appellee.

WRIGHT, C. J. (1)—Appellee claims, that the court has no jurisdiction, from the fact that an order granting a continuance under the circumstances disclosed, is not such a decision or intermediate order, as is contemplated by sections 1555-6 of the Code. We do not stop to determine this question, however, as we see no reason for disturbing the decision of the court below. Causes are to be tried in the order of their commencement, and at the first term thereafter, unless reasonable cause for continuance or change of such order, be shown. In determining such application, much must necessarily be left to the discretion of the court. We need hardly repeat, what we have frequently had occasion to say, that it must be a discretion governed and controlled by legal rules. It is not to be arbitrary, and in violation of prescribed rules, or the manifest rights of parties. In this case, we see nothing to lead us to believe, that this discretion was improperly exercised. It was not a matter of so much importance, that the action at law should be tried first, as that the rights of the parties to the property in controversy, should be properly settled; and when both actions were so pending before the same tribunal, we should require more than is now before us, to lead us to say, that it was an improper exercise of discretion, to postpone the trial of that which depended upon strict legal right, until those equities, which the defendant had been compelled to set up in a separate action, could be heard and determined. Of course, the defendant should be required to prosecute his suit in equity with diligence, and when he fails in this respect, the action at law might properly be tried. And this practice, adopted

(1) WOODWARD, J., having been of counsel, took no part in the determination of this cause.

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in this case, is not unusual in our courts, or in the courts of other states. *Hutchins v. Biddle*, 12 New H. 465; *Adams et al. v. Manning et al.*, 17 Mass. 178.

Judgment affirmed.

POLLARD v. THE STATE OF IOWA.

Section 2582 of the Code, was intended to cover those cases of defilement in which there is no force, except that which is constructive, and in which the act is accomplished principally by menace or duress, acting to subdue the will.

The offence consists in doing the act against the will of the other person, with force, menace, or duress.

The offence differs but little, if any, from rape, and embraces those acts in relation to which it is sometimes doubtful whether they constitute the crime of rape.

The nature of the case, does not call for affirmative evidence of *consent*, on the part of the defendant, but evidence of *dissent* and *repulsion*, on the part of the state; or, in other words, the defendant, in order that he may be held not guilty, is not obliged to show an affirmative act of consent.

It is within the province of the court, to instruct the jury whether the facts proved, if believed, *constitute* the offence charged.

Error to the Jones District Court.

THIS is an indictment for forcible defilement, under section 2582 of the Code, containing two counts, the first of which reads as follows: "The grand jurors, duly elected, impaneled, charged, and sworn, within and for the body of said county, in the name and by the authority of the state of Iowa, upon their oaths present, that one Charles E. Pollard, late of said county, on the 31st of day of August, 1854, at the county of Jones aforesaid, did take one Samantha Eustatia Hakes, unlawfully, and against her will, and by force and menace, and duress, compel her, the said Samantha Eustatia Hakes, to be defiled; and did then and there lay hold of her, the said Samantha Eustatia Hakes, and with both his hands held her, the said Samantha Eustatia Hakes, upon a bed,

2	567
79	740
2	
88	
2	567
97	372
2	567
109	878
2	567
123	687

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and did then and there force, ravish, and have carnal knowledge of her, the said Samantha Eustatia Hakes; and her, the said Samantha Eustatia Hakes, in manner and form aforesaid, did then and there defile, contrary to the provisions of the Code of Iowa, in such case made and provided, and against the peace and dignity of the state of Iowa." To this indictment, the defendant pleaded not guilty.

On the trial, the only witness called by the state, was the said Samantha Eustatia Hakes, who testified as follows: That at the time charged, she was about twelve and a half years old; that on the last day of August, 1854, she attended the wedding of her brother, and went home, near evening, with the defendant and his wife, who is her sister; that he lived in Jones county; that at night, she went to bed in the same room with the defendant and his wife; that her bed was about ten or twelve feet from that of the defendant and his wife; that during the night, she was awakened by the defendant, who had got in bed with her, and had his arm on her shoulder, and was in the act of sexual intercourse with her; that she was awakened by the pleasure of sexual enjoyment, and suffered no pain; that she told the defendant to go away; that he told her to keep still—he would not hurt her; that that was all she said or did; that she did not consent; and that she made no outcry, and made no resistance." When asked the question, whether the defendant used any more force, than any man would in having sexual intercourse with his wife, the same witness answered as follows: "That she supposed not; that she could have awakened her sister, by calling her; that, on a subsequent occasion, the defendant offered to do the same thing, when she called to her sister, and he desisted; that her mother is dead, and her father lives in California; that she did not commence this prosecution, and did not desire it to be commenced, nor did she desire it to be prosecuted now; and that she had been brought to this trial by compulsory process." The defendant offered no evidence. The court, at the request of the state, charged the jury as follows:

"1. That if the jury believe, from the evidence, that the

prosecuting witness was asleep, when the defendant went to bed to her, and that when she awoke, the defendant was in the very act of having sexual intercourse with her, it is a circumstance to be considered in making up their minds as to whether there was any consent on her part.

"2. That no particular amount of force is necessary to make out the offence; if the act was done against the will of the woman, then there was force and duress, in contemplation of law."

To these instructions, the defendant excepted, and asked the court to instruct the jury as follows: "That if the jury believe, from the evidence, that the defendant went to bed with the woman whom he is charged to have defiled, and she said nothing to him, except to go away, and he replied, "be still—he would do her no harm;" and he put his arms around her, and had sexual intercourse with her; and that there were other persons in the same room, whom she might have awoke by simply making a noise, and she made no noise, and no resistance, the defendant is not guilty, and the jury ought to acquit," which instruction the court refused to give, and the defendant excepted. The defendant having been found guilty, moved for a new trial, for the reason that the facts as proved do not constitute the offence charged, which motion was overruled, and the defendant sentenced to imprisonment in the penitentiary for the term of one year, and to pay a fine of two hundred dollars and costs. The giving and refusing the instructions above set forth, and overruling the motion for a new trial, are assigned for error.

Whitaker & Grant, for the plaintiff in error.

D. C. Cloud, attorney-general, for the state.

WOODWARD, J.—However reluctant the court may be, to express an opinion which permits one who has been guilty of an offence, and has violated all sense of decency, to go free, and that, too, when he may have committed an offence greater in its degree than that with which he is charged, yet it would be a violation of our duty, to permit him to be

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punished for an offence, of which he has not been proved guilty, or to be punished for one offence, because he has been guilty of another.

We think the defendant should have had a new trial. The offence charged, lies in doing the act, "against the will" of the other person, with force, menace, or duress. It is true, that no particular amount of force is necessary to constitute the offence, and the section, 2582 of the Code, was probably intended to cover those cases, in which there is no force, except that which is constructive, and in which the act is accomplished, principally, by menace or duress, acting to subdue the will; but it contemplates, at least, an act against the will. If the will is subdued to submission, by menace or duress, the act is still against the will, in every fair sense; and just such a case is provided for in this section of the Code. But, in order that the defendant may be held not guilty, he is not obliged to show an affirmative act of consent, as is implied in the first instruction, asked by the prosecution, and given. That tells the jury, that if they believe the girl was asleep when the defendant came to her, that is a circumstance to be considered in making up their minds, whether there was any consent on her part. The nature of the case does not call for affirmative evidence of consent, on the one side, but of dissent and repulsion on the other. It would be difficult to conceive of a case of a female, not yet abandoned, affording less evidence of dissent, or more negative evidence of assent; and the negative evidence, in such a matter, is all important.

The fact of the girl being asleep, if believed to be a fact, is a circumstance, it is true, but one of very little or no moment, unless there were some manifestations of dissent, when she awoke. It is just as consistent with willingness, as with unwillingness, and takes its character from the subsequent events. Adultery, or seduction, would seem to be more nearly reached by the proof, than forcible defilement. The defendant should have had a new trial, and the court should have given the instruction asked by him. It is within the province of the court to instruct the jury,

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whether the facts proved, if believed, constitute the offence charged. This is often done, in one form or another, as in murder, larceny, &c., by instructing, whether certain facts make the offence, or come within the definition. Such are instructions upon what is a breaking, in burglary; what a deadly weapon; and what a taking and carrying away.

Judgment reversed.

FORSHEE v. ABRAMS *et al.*

9	5
80	5
9	571
106	25
106	200

Where in an action for a joint libel against several defendants, to which there was a joint answer of not guilty, some of the defendants filed their affidavit, setting forth that certain of their co-defendants were material and necessary witnesses for them—that they could prove matters material to their defence by said co-defendants, which could not be proved by any other witnesses—and that justice required they should have separate trials, upon which affidavit a motion for separate trials was made and overruled, on the ground that such co-defendants would not be competent witnesses on the trial of the others; *Held*, 1. That where such a motion is granted or refused by the court below, in the exercise of its discretion, this court will require a very strong showing, before it will hold such discretion to have been improperly exercised. 2. That under the circumstances stated, their co-defendants were not competent witnesses for the parties asking separate trials.

Where in an action for libel, the defendants, after proving by a witness that the general character of the plaintiff was bad, and that he was reputed to be a "slanderer," proposed to prove that the plaintiff had been "guilty of speaking slanderous words of others," which evidence was rejected; *Held*, That the evidence was clearly inadmissible.

And where in such an action, the defendants proved by one F., that the plaintiff's general character, in the neighborhood where he resided, was bad; and then offered to prove by the same witness, that the plaintiff was generally reputed a *malicious* man, which evidence was excluded; *Held*, That the evidence in no manner tended to establish the fact that the libel was not published, nor to show that the plaintiff's damages should, for that reason, be less, and was properly excluded from the jury.

And where in such an action, the defendants proved that a short time previous to the burning of the school-house, referred to in the libel, an attempt was made to burn the said house; that about the time of this attempt, a witness passed the house late at night, saw a great light therein, and heard persons talking inside, but who they were, the witness could not state; that one B. was a near neighbor of plaintiff, and intimate with him, and had enmity

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towards one of the defendants; that this B. had proposed to a witness to assist the plaintiff in a certain other lawsuit against said defendant; that B. and plaintiff had voted against having a school in this school-house; that plaintiff knew that A. would probably be employed as a teacher, and further, that said A. had been employed, and commenced teaching four days before the house was burned; that plaintiff had, for some years past, associated with B. and two other persons, and had but little communication with the defendants; and that on the next day after the burning, the plaintiff and B. were seen talking together in a hollow near the road, a short distance from the plaintiff's home; and thereupon the defendants offered to prove that B. had proposed to a witness to go to the house of A., and steal chickens, take them to the school-house, have a feast, and then burn up chickens and feathers, together with the house, which testimony was excluded from the jury; *Held*, That the evidence was properly rejected.

Where in an action for libel, the defendants asked the court to instruct the jury as follows: "That they need not be satisfied, beyond a reasonable doubt, as to the matters of their defence, but it is only necessary that they should be satisfied from the evidence, and all the circumstances of the case before them, of the truth of the matters alleged in defence," which instruction the court refused to give; *Held*, That the instruction was properly refused.

If a defendant in an action for libel, imputes a crime, and justifies in his defence, he must, in order to sustain his plea, adduce such evidence as would be required to convict the plaintiff, if on his trial for the crime imputed to him.

Section 1810 of the Code, which provides, that in applications for new trials, the affidavits of jurors may be taken and used in relation to such applications, was not designed to compel jurors, by rule, to answer under oath as to how, or in what manner, they made up their verdict.

Where after verdict for the plaintiff, in an action for libel, the attorney for the defendant filed his professional statement, alleging that the jurors agreed to make up their verdict by marking each a certain sum, and dividing the aggregate by twelve, and that some of the jurors admitted these things, but refused to give a statement or affidavit as to the manner in which they made up their verdict, upon which statement the attorney moved for a rule on said jurors, to answer as to the truth of said matters, which motion was overruled; *Held*, That the motion was properly overruled.

Section 2772 of the Code, which provides, that in all indictments or prosecutions for libel, the jury, after having received the direction of the court shall have the right to determine, at their discretion, the law and the fact, refers to criminal prosecutions, or trials upon indictments, and not to a civil proceeding to recover damages.

The word *direction*, in section 2772 of the Code, means instruction.

Appeal from the Davis District Court.

THIS action was brought to recover of Abrams and thirty-

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two others, damages for writing and publishing certain libelous matter of and concerning the plaintiff. The petition contains three counts, and charges the defendants with having written and published certain letters and notices, accusing plaintiff of the crime of arson, in burning a certain school-house. The defendants answer, denying the charge contained in the petition; in substance, they plead "not guilty." On the trial, several exceptions to the rulings of the court were taken by the defendants, which, as far as material, will be found referred to in the opinion of the court. All of the defendants, but one, were found guilty. Motions in arrest, and for a new trial, overruled. Judgment on the verdict, and defendants appeal.

C. C. Nourse and Jones, for the appellants.

Palmer & Trimble and Knapp & Caldwell, for the appellee.

WRIGHT, C. J.—The defendants first assign for error, the overruling of their demurrer to plaintiff's petition. The record shows, that the cause coming on to be heard, on defendants' demurrer to the plaintiff's petition, the same was overruled; but we find no demurrer, or further reference to it, in any part of the transcript. What were the grounds of the demurrer, we have no means of knowing, and cannot, therefore, say that it was improperly overruled.

The next assignment of error, relates to the refusal of the court to grant some of the defendants a separate trial. It appears that some of the defendants, filed their affidavit, setting forth that certain of the other defendants were material and necessary witnesses for them; that they could prove matters material to their defence by said co-defendants, which could not be proved by any other witnesses; and that justice required that they should have separate trials. A motion, based upon this affidavit, was overruled, on the ground that said co-defendants would not be competent witnesses on the trial of the others. The bill of exceptions proceeds to state, that "the court did not hold in its discretion, that justice would

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not be promoted by a separate trial, but refused the motion on the ground above named." The defendants now claim, that the court erred in not granting separate trials, without reference to the question of the competency of those not on trial, as witnesses.

As to this, it is sufficient to say; *first*, that no such question was made to the court, but the claim for separate trials was based alone upon the necessity of using the other defendants as witnesses. In the *second* place, we see nothing to satisfy us, that the discretion reposed in the court below, has been abused. Under the Code, such separation may be allowed by the court, "whenever in its opinion justice will be thereby promoted." Where such motion is granted, or refused by the court, in the exercise of its discretion, we should require a very strong showing indeed, before we should hold it to have been improperly exercised. In this case, the defendants are charged with having written, signed, and published, certain scandalous and defamatory matter of, and concerning the plaintiff. To sustain the petition, a certain paper or papers, are introduced, purporting to be signed by all of said defendants, in their own proper handwriting. It would, therefore, appear to have been one act—a publication made by them, in carrying out a common purpose; and we can scarcely conceive any good object that could be accomplished in taking up the time of the court in having separate trials; unless, indeed, those not on trial, would have been competent witnesses for those on trial—and this question we now proceed to examine. We do not think, under such circumstances, that they would have been competent.

After the testimony of the plaintiff was closed, if no evidence had been offered, showing the guilt of one, or any number, of said defendants, they might, on motion, have had a verdict in their favor, and then have been introduced for their co-defendants. But so long as they remain parties to the record, and liable for costs, and any judgment that might be rendered, they are incompetent. By having separate trials, the liability of each for any judgment that might be rendered, is not changed. And especially is it so,

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in a case of this kind, where it is charged that the defendants were actuated by a common intent to injure the plaintiff. If all are guilty, it is proper to so charge them. If it shall turn out that a portion are innocent, then let them be discharged, and be sworn as witnesses.

And the argument that the plaintiff made all these persons defendants, to prevent them from being witnesses, loses its force under this rule; and if, by the operation of such a rule, they are excluded, it is but the result of their own wrongful act, and they have no ground, either legally or equitably, to complain. This conclusion, we think, is abundantly sustained by authority, as well as reason. Indeed, the rule is so well settled, that it is now but seldom controverted. In this case, the defendants were all served—all joined in the answer—as to none of them, had the cause been determined, either by default or verdict after trial; and under such circumstances, we are aware of no case that will justify the doctrine urged by appellants. On this subject, see *Bent v. Baker*, 3 T. R. 27, reported in 2 Smith's Leading Cases, 39; and particularly page 88 of the notes by the American editors. Also, *Sawyer v. Merrill*, 10 Pick. 16; *Commonwealth v. Marsh*, Ib. 57; *Van Deusen v. Van Slyck*, 15 Johns. 223; *Moore v. Eldred*, 3 Hill, 104, and the note; 1 Phillips' Evid. 57; 3 Ib. 55, 61; 1 Greenl. Ev. §§ 329, 347, 358.

The cases cited by appellants, establish no contrary rule. In *Stockham v. Jones et al.*, 10 Johns. 21, one of the defendants was not served, nor did he appear, or plead. Under such circumstances, he was held competent for those who were served. In *Gould v. Janus*, 6 Cowen, 369, the witnesses offered were not sued, nor in any manner parties to the record. They were objected to as being trespassers, like the defendants, on the *locus in quo*, and were admitted, for the reason that the verdict could not be evidence for or against them. The case referred to in 1 Phillips' Ev. 119, was where two actions had been brought against two persons for the same assault, and it was held that in the action against one, the

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other may be a witness, because he is not interested in the event. In *Morris v. Daubigny*, 16 Eng. Com. Law, all that is decided is, that in trespass, a person who commits the trespass, but is *not sued*, is a competent witness for the plaintiff, against his co-trespasser, without being released by the plaintiff. This, and all the cases just named, present quite a different question from the one now before us. The distinction, we think, is easily perceived.

It further appears, that the defendants, after proving by a witness, that the general character of the plaintiff was bad, and that he was reputed to be a "slanderer," proposed to prove that said plaintiff had been "guilty of speaking slanderous words of *others*, in fact, which the witness heard," which was objected to, and the objection sustained. This testimony was clearly inadmissible. Its object is not perceived, nor has any legitimate one been pointed out in the argument. It was not even proposed to prove that plaintiff slandered the *defendants*, but that he slandered *others*. And without speaking of the many objections to this testimony, another controlling one is, that the effect of the testimony was to prove individual or *particular* acts, instead of general character. This is not permissible.

It is next objected, that the court erred in excluding the testimony of one French. This witness being called by the defendants, stated that plaintiff's general character, in the neighborhood where he resided, was bad; and defendants then offered to prove by the witness, that plaintiff was generally reputed a *malicious* man, which being objected to, was excluded. This testimony is claimed to have been admissible, as tending to show that plaintiff was guilty of the arson said to be charged in the libel. Without determining that it would be admissible for any such purpose, under a *proper* state of pleadings, it is sufficient to say, that no plea of justification appears in the record, nor is there anything to show that such an issue was made. The only plea, already stated, is in denial of the libel charged in the petition. If even admissible under a plea of justification (which we by no means admit), it certainly cannot be, under the issue

here made. Such evidence in no manner tends to establish the fact that the libel was not published, nor to show that plaintiff's damages should, for that reason, be less. The proof of general bad character was properly received, but it was improper to receive proof of a particular fault or disposition, or particular traits of character.

It also appears by the bill of exceptions, that a short time previous to the burning of the school-house, referred to in the libel, it was *attempted* to be burnt; and that about this time, as another witness testifies, he passed the house late at night, saw a great light therein, and heard persons talking inside, but who they were he does not state, nor is it otherwise shown. By another witness it was proved, that one Bennett was a near neighbor of plaintiff, and intimate with him, and had enmity toward one of the defendants; and that this Bennett had proposed to witness to assist plaintiff in a certain other lawsuit against said defendant. And it further appeared, that said Bennett and plaintiff had voted against having a school in this school-house; that plaintiff knew that Abrams (one of the defendants) would probably be employed as a teacher; that said Abrams had been employed, and commenced teaching four days before the house was burnt; that plaintiff had for some years past associated with Bennett and two other persons, and had but little communication with the defendants; and finally, that on the next day after the burning, plaintiff and Bennett were seen "talking together in a hollow near the road, a short distance from plaintiff's house." And thereupon defendants offered to prove, that Bennett had proposed to witness to go to the house of Abrams and steal chickens, take them to the school-house, have a feast, and then burn up chickens and feathers, together with the house, which testimony being objected to, was excluded, and this is the next error assigned.

We think the testimony was properly rejected. Taking all the preceding circumstances together, they amount to this: that Bennett and plaintiff were intimate, and acted together in an unfortunate difficulty which had arisen in the school district, and that Bennett favored plaintiff's cause

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in a certain other law suit. That they, or either of them, were near the school-house at the time of the burning or attempt to burn—or that they ever said a word together on the subject—is not shown, nor can it be fairly claimed, from all the circumstances. They talked together near the road, on the next day, it is true, but about what? It appears to us it would be manifestly unjust, under such circumstances, to hold plaintiff liable, or prejudice his case, by proving what Bennett said. If there was a plea of justification, this testimony would be inadmissible to maintain it. And if it is claimed, that while it might not show guilt, it at least might tend to excuse and extenuate the act of the defendants, and thus go in mitigation of damages, one, and perhaps a sufficient, answer to such an argument, is, that there is nothing to show that defendants knew of this conversation, at the time of the publication of the libel, or that they were in any manner influenced by it. Based, as the appellant's argument on this point is, upon the ground that the circumstances proved or established a combination or conspiracy between the plaintiff and Bennett, to burn the school-house, it is sufficient to say, that we do not think they prove any such common purpose or combination. This foundation must first be laid—it must have been proved that these individuals were connected in the unlawful enterprise charged—and that the alleged declarations of Bennett, were made during the pendency of the criminal enterprise. Greenleaf's Ev. § 111. When these declarations were made by Bennett, is not shown, to say nothing of the absence of proof as to the combination.

The defendants asked the court to instruct the jury, "that they need not be satisfied beyond a reasonable doubt, as to the matters of their defence; but it is only necessary that they should be satisfied from the evidence and all the circumstances of the case before them, of the truth of the matters so alleged in defence." This instruction was refused, and defendants excepted. We may say, in the first place, that we cannot see to what part of the defence this instruction was applicable. It would seem to point to a plea of

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justification. If so (and this has been assumed in the argument), then it was properly refused; because there was no such issue made by the pleadings. But aside from this objection to the instruction, we think it improper, even granting there was a plea in justification. We understand the rule to be, that if a defendant imputes a crime, and justifies in his defence, he must, in order to sustain his plea, adduce such evidence as would be required to convict the plaintiff, if on his trial for the crime imputed to him. This was substantially so decided, in *Bradley v. Kennedy*, 2 G. Greene, 281; and is fully recognized as the rule by the books. 2 Greenleaf's Ev. §§ 426, 408; *Hopkins v. Smith*, 3 Barb. S. C. 599; *Woodbeck v. Keller*, 6 Cowen, 118.

After the verdict was rendered, the attorney for defendants filed his professional statement, alleging that said jurors agreed to make up their verdict by marking each a certain sum, and dividing the aggregate by twelve; and that some of the jurors admitted these things, but refused to give any statement or affidavit, as to the manner in which they made up their verdict. Thereupon, counsel moved for a rule on said jurors, to answer as to the truth of said matters, which motion was overruled, and this is now assigned for error. Our Code provides that the affidavits of jurors may be taken, and used in relation to applications for new trials, § 1810. This is an innovation upon the common law rule, and we are not disposed to extend it beyond what is fairly justified by the language used. It only permits that to be done, which, under no circumstances, was previously allowed. If jurors voluntarily give such affidavits, they may be used; but it was not designed to compel them, by rule, to answer under oath as to how, or in what manner, they made up their verdict. To allow such a practice, would be to invade and interfere with the rights of jurors, and the discharge of their duties in the jury-room, to an extent never contemplated by our Code. If there has been fraud or unfair dealing on their part, of course, they are not beyond reach of judicial inquiry; but upon a mere allegation of their having

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acted improperly, they should not be compelled to disclose how they made up their verdict.

It is further claimed, that the jury in this case, were the judges of both the law and the fact, and, therefore, it was error to give them any instructions. The Code provides, that in all indictments or provocations for libel, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact. Section 2772.

This objection cannot avail defendants, for the following reasons: First, no objection was made, at the time, to the court's instructing the jury, and it is now too late to make it. Second, the section quoted, expressly gives the court the right to give directions to the jury, which we construe to mean, what are commonly termed instructions. And in the third place, we understand this section to refer to criminal prosecutions, or trials upon indictment, and not to a civil proceeding to recover damages.

Other errors are assigned, but as they are all substantially passed upon, in what has already been said, and have not been urged in argument, we need not further extend this opinion. We see nothing to justify us in disturbing this judgment, and it is, therefore, affirmed.

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2	589
81	411
2	589
85	275
2	580
110	422
2	580
124	408

Section 2390 of the Code, which provides, that a person who has a direct, certain, and legal interest in the suit, is not a competent witness, unless called on by the opposite party, is but declaratory of the rule stated conversely in the books, that a person is competent, unless he has such an interest.

The preceding section, which provides, that facts which have heretofore caused the exclusion of testimony, may still be shown, for the purpose of lessening its credibility, also recognizes another rule before settled, that there must be some clear and adequate reason for the exclusion of testimony, otherwise it will be received, and the credibility of the witnesses left to the jury.

The true test of interest is, that the witness will either lose or gain by the di-

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rect legal operation and effect of the judgment, or that the record will be legal evidence for or against him, in some other action.

If the interest is of a doubtful nature, the objection goes to the credit of the witness, and not to his competency.

Where it is not clear that a witness is incompetent for all purposes, the better practice is, to let him be sworn, and raise the question as to his competency when an improper question is asked.

The object of the law is to exclude improper evidence; and, as a general rule, this can be done with more certainty, when the objection is made to improper questions, and this shown by exceptions, taken at the time.

Where the witness is incompetent for all purposes, the objection should be raised before he is sworn.

Where in an action for the conversion of certain sheep, the defendant called a witness, who testified that one R. F. was a partner of defendant, and joint owner of the flock of sheep, which was being driven by defendant (with which it was alleged that the plaintiff's were mixed and driven off); that they were in partnership as to certain farms in Ohio; and that he had heard defendant say, that all the sheep in the flock were his; and where the defendant then called the said R. F. as a witness, to whose examination the plaintiff objected, for the reason that the testimony of the former witness, showed the said R. F. to be so far interested as to render him incompetent, which objection was sustained by the court, without examining the said R. F. on his *voir dire*, and the witness excluded; *Held*, That the court erred in excluding the testimony of the witness.

Instructions not excepted to in the court below and embodied in a bill of exceptions, cannot be reviewed by the appellate court.

Where the errors assigned have no reference to the instructions, the appellate court will not notice the instructions.

An instruction, abstractly correct, if not applicable to the case, may properly be refused.

To show the applicability of an instruction which has been refused, the appellant should bring up, in a proper manner, the testimony on which he relies to show its applicability.

Where instructions are asked, which are given with qualifications by the court, the party asking the instructions, must object to their qualification, and deny the right of the judge thus to qualify them, at the time, or else he cannot deny such right in the appellate court.

To maintain an action for the conversion of property, there must be property in the plaintiff, and also a right to the possession, at the time of the conversion.

There must, also, be a conversion of the thing by the defendant, to his own use.

It is not material whether the defendant came to the possession originally, by right or by wrong; and the conversion may be either direct or constructive.

Where the circumstances, of themselves, do not amount to an actual conversion,

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it will be incumbent on the plaintiff, to give evidence of a demand and refusal, prior to the commencement of his action.

The demand may be either of the chattel itself, or its value.

The value of the property, at the time of the conversion, with interest, is the measure of damages, where there is no claim for special damages.

The refusal to comply with a demand, where the plaintiff requires a much larger sum than is his right, is not conclusive evidence of a conversion. The effect of such refusal, must depend upon the manner of the refusal, and the attendant circumstances.

If the defendant makes no objection to the amount demanded, and does not place his refusal to pay on that ground; or does not himself offer to pay anything, the jury may conclude that the demand and refusal, are sufficient.

An offer to return property, at a distance from where it was taken, will not bar an action for the conversion.

Appeal from the Scott District Court.

THIS action is brought to recover the value of eighty sheep, which plaintiff alleges belonged to him, and which defendant converted to his own use. It appears that defendant was driving sheep from Ohio to Iowa, and when near Joliet, in Illinois (as plaintiff alleges), plaintiff's sheep got into the drove, and were driven by defendant to Davenport, in this state, at which place they were demanded, but not returned. All material allegations of the petition, are denied in the answer. The issue being fully made, there was a trial by jury; verdict for plaintiff, the usual motions for a new trial, and in arrest of judgment, which were overruled; and judgment on the verdict, and defendant appeals.

In the progress of the trial, as shown by the bill of exceptions, the defendant called on one Parkhurst as a witness, who testified, "that the defendant was driving a flock of sheep from Ohio, through Illinois; at or near Joliet, certain sheep became mixed with defendant's flock, and that defendant, with his hands, immediately, or as soon after as possible, separated such stray sheep from the flock, and drove them back towards the place whence they came." He also testified, that one Richard Fanning, of Ohio, and who was in Ohio when the mixing of the sheep took place, was a partner of defendant, and joint owner of the flock of sheep, which was being driven by defendant, and that they were in partner-

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ship as to certain farms in Ohio; and that he heard John Fanning say, that all the sheep in the flock at Davenport were his. The defendant's counsel then called the said Richard Fanning, as a witness, and to his examination counsel objected, for the reason that the testimony of Parkhurst, showed the said Richard to be so far interested, as to render him incompetent. The said Richard was not examined on his *voire dire*, and upon the proof made by the testimony of Parkhurst, the said witness was not allowed to testify. Certain instructions of defendant were refused, and will be found referred to in the opinion, as also those given at the request of plaintiff, to which objections are urged.

Corbin & Dow, for the appellant.

Cook & Dillon, for the appellee.

WRIGHT, C. J.—It is first claimed, that the court erred in excluding the testimony of the witness, Fanning. The Code, section 2390, in providing that a person who has a direct, certain, and legal interest in the suit, is not a competent witness, unless called on by the opposite party, is but declaratory of the rule, stated conversely in the books, that a person is competent, unless he has such an interest. And the preceding section, which provides that facts which have heretofore caused the exclusion of testimony, may still be shown, for the purpose of lessening its credibility, also recognizes another rule before settled, that there must be some clear and adequate reason for the exclusion of testimony, otherwise it will be received, and the credibility of the witness, left to the jury. The general rule is, that all persons may be witnesses. One exception to the rule, well understood, is, that those interested may not be witnesses. What this interest shall be, in order to exclude, is stated in different terms, by various writers and authorities.

In general, the witness is competent, unless he be interested in the event of the suit. *Bent v. Baker*, 3 Term R. 29. A witness, who has no interest in the event of the

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cause, shall not be rejected as incompetent. *Jordaine v. Lashbrooke*, 7 Term, 601. If the witness will not gain or lose by the event of the cause, and if the verdict cannot be given in evidence for or against him, the objection is to his credit, and not to his competency. *Van Ness v. Leshane*, 8 Johns. Cases, 32. If he be not implicated in the legal consequences of the judgment, the witness is competent, so far as relates to the question of interest; and by legal consequences, are meant those which are fixed, certain, and actual, and by which an advantage, not depending on a contingency, is to be gained or lost—such, for instance, as being able to give the verdict in evidence, on the one hand, or being subjected to an incumbrance or duty, on the other. *Bennett v. Helhington*, 16 Serg. & R. 195; *Bliss v. Thompson*, 4 Mass. 448. A witness, who has a legal interest in the subject matter, for the recovery of which the suit is brought, or who will gain or lose by its event, is necessarily incompetent to give evidence in favor of that side of the issue on which his interest lies. *Athey v. McHenry*, 6 B. Mon. 50; *Stebbins v. Sackett*, 5 Conn. 278. The interest, in order to disqualify, must be legally certain, and not merely possible or probable. *Gebhard v. Schindle*, 15 S. & R. 239; *Nicholson v. Frazier*, 4 Harrington, 206. The mere expectation of benefit, or apprehension of loss, from the event of the suit, or the strongest bias, will not exclude; but the witness must have an actual interest, which, however trivial, will render him incompetent. *Dean v. Speakman*, 7 Blackford, 317; *Bridges v. Armour*, 5 How. 91; *Grove v. Brien*, 8 How. 249; *Rollins v. Faber*, 25 Maine, 144. Mere interest in the question at issue between the parties, will not disqualify. *Branch v. Doane*, 17 Conn. 402; *Stewart v. Conner*, 9 Ala. 803. The true test of interest is, that the witness will either lose or gain by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him, in some other action. 1 Greenleaf Ev. § 390. These references sufficiently state, the character of interest which will render the witness incompetent. As already stated, there is another rule recognized by our Code, which is, in like

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manner, stated in different forms by the authorities, but still a rule generally acted upon, and of great importance in the trial of causes. We refer to the rule stated in *Shipton v. Thornton*, 9 A. & E. 327, in these words: "As objections, on the score of interest, are not to be favored, the safe rule is, to admit the witness, whenever there is doubt on the fact. It is then still open to the objection, to urge the same circumstances to the jury, as proper to lessen the credit of the witness with them." And again, in the language of the note to *Bent v. Baker*, 2 Smith's Lead. Cas. 77, "Courts have evinced a laudable desire to let in truth, wherever precedent will admit it, by holding objections to apply, rather to the credit, than the competency." See, also, *Draper v. The Norwich & Worcester R. R. Co.*, 11 Metc. 505. If the interest is of a doubtful nature, the objection goes to the credit of the witness, and not to his competency. 1 Greenleaf Ev. § 390.

Having thus stated some of the general rules touching the competency of witnesses, let us briefly apply them to the case before us. And while we recognize the rule, that it is the duty of the court to judge of the competency of the witness, as it is of the jury to judge of his credibility, after his testimony is before them; yet we think that in this case, the court below might well have admitted this testimony, without violating any rule, for the reason that the testimony of Parkhurst, leaves it somewhat doubtful, whether the witness, Fanning, had an interest in the sheep driven from Ohio; and where there is doubt, as already shown, the testimony should be received, and its credibility judged by the jury. But without putting the decision of the question upon this ground, we will assume that he had an interest in the Ohio flock, and yet we think the witness competent. In the first place, let us ask, would the record in this case be legal evidence against the witness, in any other action? If so, upon what principle? In the determination of this, and all other questions, we must necessarily have reference to the relations of the parties, and the circumstances under which such questions arise. The defendant and witness

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were partners, and this partnership extended to the sheep which were driven from Ohio to Iowa. In the discharge of that duty, the defendant was the agent of the partnership. But he was not the agent of the partnership to commit a tort, or wrongful act. The commission of a tort, was not within the proper scope and business of the partnership undertaking—was not authorized or adopted by the other partners, and under no other circumstances, can we conceive that the partnership would be bound by his tortious acts. Story on Part., § 168. Suppose, then, that plaintiff recovers in this action, and the defendant should seek to have his brother (the witness) contribute to its payment. There is no principle, certainly, upon which he would be liable. The record of the recovery would not be evidence, because the witness is neither a party or privy to it, and was in no manner connected with the immediate act or circumstance which created the liability. Or suppose, again, that the defendant, in the event of a recovery against him, when accounting for the proceeds of the flock of sheep, should claim to deduct the costs and expenses of the litigation, or the amount of the judgment recovered. He would have no legal right to do so, any more than he would the costs and expenses for defending himself against the charge of stealing a horse, while driving these sheep to Iowa. The partner might allow such payment, in the final accounting, from honorable motives, or otherwise, but as he would be under no legal obligation to do so, mere honorable considerations could not exclude him as a witness.

Let us reverse the case, and suppose that plaintiff is defeated in his action, and defendant thereby, as is assumed, is found to have eighty or a hundred head of sheep more than he started with, or the firm owned. Does it therefore necessarily follow, that the record in the case would be evidence to show that witness was entitled to the benefit of such excess? Could not the defendant fully answer to that claim, that he was intrusted by the firm with a thousand head of sheep, and if he by a wrongful act, got more, it was a matter of no consequence to the firm? How could the firm claim

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a benefit from an act, for which it could in no manner be responsible—which it no way authorized or adopted—and which was in no manner within the scope of the partnership business? The charge is, that the defendant wrongfully converted to his own use, certain sheep. For that act, he is alone responsible. And the fact that he had charge of other sheep, at the time of the conversion, which belonged to himself and another person, cannot possibly change the character of that act, any more than if he had wrongfully taken cows or horses. The question is not, whether plaintiff owns part of the sheep which were intrusted to defendant by the firm, but whether defendant did or did not take plaintiff's sheep.

Again: could this witness either gain or lose by the direct, legal effect and operation of the judgment in this case? What we have already said on the other branch of the inquiry, perhaps sufficiently answers this. Indeed, it is somewhat difficult to separate the one from the other, in the consideration of questions of competency. We will only add a brief reference to cases, which we think sustain the competency of the testimony. It is conceded in the argument, that if A. is charged with having wrongfully converted the property of B. to his own use, C. would be a competent witness for A., to prove that he (C.) owned and had a right to the possession of the disputed property, and such is certainly the rule. *Bush v. Lyon et al.*, 9 Cowen, 52; Stark. Ev. 1508; *Ward v. Wilkinson*, 4 B. & A. 410. And what is the reason of the rule? Because, in the language of the case from 9 Cow. 52, as between the witness and the plaintiff, or the witness and the defendant, the verdict which is obtained upon this testimony, will be of no avail to him. Suppose, instead of this defendant, one of the hands, or defendant's employee, had been charged, and sued for the value of these sheep (and if it was a wrongful act, and such hands participated therein, then they might be held responsible, for they could plead no authority from the defendant in justification). In such suit, would not this defendant, as well as this witness, have been competent witnesses to prove prop-

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erty in themselves, and thereby have defeated this action? They certainly would, according to the rule as admitted by counsel for appellee, and shown by the above authorities. Why is the rule different, then (upon the supposition that the object of the proposed testimony was to show property in the witness and the defendant), because the alleged wrongdoer was a partner of the witness at the time of the act? If he would be competent to prove that he owned the whole property, why not to prove that he owned a part of it? Further, the doctrine is well settled, that if two or more are sued in tort, and the plaintiff fails to make out his case against any one, a verdict may be taken in his favor at once, and his testimony received in behalf of the others. *Van Deusen v. Van Slyck*, 15 John. 223; *Moon v. Eldred*, 3 Hill, 104; *Walworth v. Mountford*, 4 Wash. C. C. 79; *Wakely v. Hart*, 6 Binney, 319.

Then, if in this case, the witness, with the brother (now defendant), had been jointly charged with this tort, and had been discharged, for want of testimony to show his liability, would he be incompetent, because he owned, jointly with his co-defendant, a flock of other sheep, with which it was said the sheep of the plaintiff had mixed, and been driven off, by the remaining defendant's wrongful act? If not, how is he less competent, in a case to which he was never a party?

We then dismiss this part of the case, only remarking, that the fact that defendant, at the time of the supposed wrongful taking, had sheep belonging to himself and the witness, is the cause of all the doubt and difficulty which apparently surround this question. So soon as that circumstance is out of view, the question is easily settled, and, as already stated, we cannot say why that fact should, in the least, change the competency of the witness. And we also add another thought. Where it is not clear that a witness is incompetent for all purposes, the better practice is, to let him be sworn, and raise the question as to his competency, when an improper question is asked. The object of the law is, to exclude improper evidence, and, as a general rule, this can

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be done with more certainty, when the objection is made to improper questions, and this shown by exceptions taken. If, however, the witness is incompetent for all purposes, the objection may well be taken before he is sworn. *Beal v. Finch et al.*, 1 Kernan, 128.

This case must be reversed, for the reason that the court below erred in excluding this testimony. As a general rule, we would not decide more than was necessary to dispose of the case. A new trial being ordered, however, we proceed to notice briefly the instructions which are complained of by appellant. It is next urged, that the court erred in giving certain instructions asked by plaintiff. These instructions are not before us, however, in such a manner as that defendant's objection, if well taken, can avail him. In the first place, the instructions were not objected to, and embodied in a bill of exceptions; and in the next place, the errors assigned have no reference to such instructions. Under such circumstances, we cannot notice them.

The defendant asked the court to instruct the jury, that this was an action of trover, which was refused, and this refusal is assigned for error. We do not see how the giving, or refusing to give, this instruction, could prejudice either party. Under the old practice, this certainly was an action of trover. And while the court, with propriety, might have so stated, yet to refuse to do so, was certainly not such an error as could reasonably have misled the jury. One instruction asked by the defendant was refused, for the reason (as stated by the judge in the bill of exceptions), that it was not applicable. The testimony is not before us, and we are, therefore, bound to presume that the instruction was properly refused. An instruction abstractly correct, if not applicable to the case, may properly be refused. If appellant would show this court the applicability of such an instruction, he should bring before us, in the proper manner, the testimony upon which he relies, to show its applicability. *Pittman v. Gatz et al.*, 5 Gilm. 186; *Hamilton v. Hunt*, 14 Ill. 472; *Baxter v. The People*, 3 Gilm. 381; *Eyser v. Weissgerber*, 2 Iowa, 463. It is next objected, that the court re-

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refused to give some of defendant's instructions, as asked, but gave them with certain qualifications—and the right to thus qualify, is denied. To this, it is sufficient to say, that no objection appears to have been made at the time, to the right of the court to thus qualify. It was the duty of the defendant to object to this course, at the time this qualification was added, before he can deny such right in this court. This view disposes of this objection, for this case. In thus disposing of it, however, we do not wish to be understood, as denying the right of the court to add qualifying words to instructions so asked. It is not necessary to decide that question, and we therefore intimate no opinion.

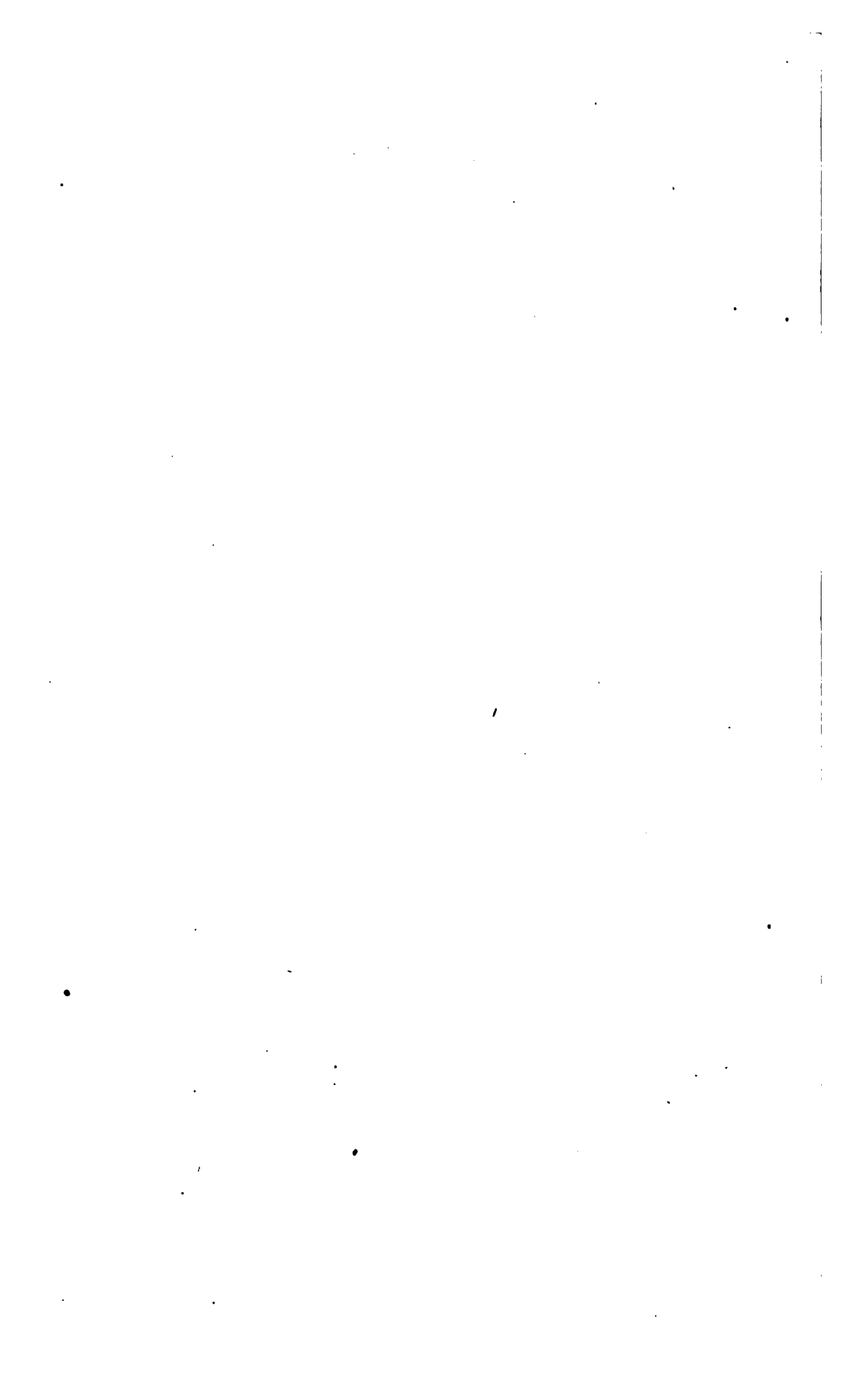
This case presents another instance of a great number of instructions given and refused, the applicability of many of which, is in no manner shown. To examine each of them at length, would unreasonably extend this opinion. We shall, therefore, content ourselves with briefly stating, what we understand to be the law, as applied to the state of the case, assumed by these instructions. To maintain this action, there must be property in the plaintiff, as also a right to the possession, at the time of conversion. And in the next place, there must be a conversion of the thing by the defendant, to his own use. It is not material, whether the defendant came to the possession originally, by right or wrong. 2 Greenleaf Ev. § 636. This conversion may be, either direct and constructive, and may arise, as stated by plaintiff's counsel (referring to 2 Saund. P. & E. 880), by the wrongful taking by—an illegal assumption of ownership—by the illegal use or misuse of the chattel—or by a wrongful detention. Where the circumstances of themselves, do not amount to an actual conversion, it will be incumbent on the plaintiff, to give evidence of a demand and refusal, prior to the commencement of his action. 2 Greenleaf Ev. 644. This demand may be either of the chattel itself, or its value. The value at the time of the conversion, with interest, is the measure of damages, where there is no claim for special damages. *Laplace v. Aupiais*, 1 Johns. Cases, 408; 2 Greenl. Ev. §§ 276, 649. The refusal to comply with a

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demand, where the plaintiff requires a much larger sum than is his right, is not conclusive evidence of a conversion.

The effect of such refusal must depend upon the manner of the refusal, and the attendant circumstances. If the defendant makes no objection to the amount demanded, and does not place his refusal to pay on that ground, or does not himself offer to pay anything, the jury might well conclude the demand and refusal to be sufficient. If the plaintiff's sheep mixed with the defendant's drove, by the plaintiff's neglect, and the defendant did use due diligence in separating them, and could not succeed, he would not be liable, without a demand and refusal. If, however, he subsequently negatived the plaintiff's right to the property, or did any act which was inconsistent with such right, the conversion would be complete. The exercise of a dominion over the property, in exclusion or in defiance of the plaintiff's right, is in law a conversion. 6 Bac. Abr. 677; *Bristol v. Burt*, 7 Johns. 254. If the defendant did not know that the sheep of plaintiff had mixed with his, he would not be liable, without proof of a demand. But, though he may not have known it, at the time, if he subsequently knew it, and made no effort to separate them, the conversion would be wrongful. An offer to return the sheep at Davenport, or at any distance from plaintiff's residence, or from where the sheep were taken, would not bar the action. On this subject generally, see authorities above referred to, and also *Spoor v. Holland*, 8 Wend. 445; Story on Bailments, § 93; *Clark v. Whitaker*, 19 Conn. 319; *Pierce v. Benjamin*, 14 Pick. 356; *Kelsey v. Griswold*, 6 Barb. 436; *Wellington v. Wentworth*, 8 Metc. 543; *Mathews v. Menedger*, 2 McLean, 145.

Judgment reversed.



INDEX.

ACKNOWLEDGMENT.

1. Section thirty-one of the act of 1840, entitled "An act to regulate conveyances," makes a deed valid between the parties, and such as have actual notice thereof. The want of the acknowledgment, or of the proof which may authorize the admission of the deed to record, does not invalidate the deed as between the grantor and grantees, and is good as to all persons who are charged with such notice. *Blain v. Stewart*, 378.

2. The acknowledgment and record of the deed, are provisions which the law makes for the security of creditors and purchasers—they are not essential to the validity of the deed as to the grantor. *Ib.*

3. Where in an action of right, the plaintiff claimed title to the premises under a deed from one I., dated March 13, 1853, and where the defendant claimed title under a judgment in the District Court against W. and R., rendered October 26, 1841, a sale of the premises on execution, as the property of W., and a sheriff's deed, dated May 6, 1843, and showed by the testimony of W., that he purchased the premises of I.; that I. conveyed to him by warranty deed; and that W. afterwards (March 31, 1842) conveyed to B., T. & B., of St. Louis, of which firm the plaintiff was a partner, and delivered to their agent, the deed from I. to himself, to be placed upon record; and where the defendant further proved by I., that he sold the premises to W. about the year 1841 or 1842, and thinks that he conveyed the same by deed; that witness afterwards, at the request of B., T. & B., took up the deed he had made to W.—the same never having been recorded—and made a deed directly to B., T. & B., dated February 25, 1843; that the deed to W. is lost, or was destroyed by the witness, and never was upon record; and that in March, 1853, he executed the deed given in evidence by plaintiff; and where the plaintiff, to rebut this testimony, gave in evidence the deed from W. to B., T. & B., dated March 31, 1842, and the deed from I. to them, dated February 25, 1843, and proved that B., T. & B. obtained the deed from I. directly to themselves, to save circuity of title through W., and that in the spring of 1853, the plaintiff finding a defect in the acknowledgment of the deed from I. to B., T. & B., and being the survivor of the partnership, which had been dissolved, procured from I. the deed, dated March 13, 1853, to be made directly to himself; and where upon this state of evidence, the court instructed the jury, that the plaintiff was entitled to recover, unless the title of defendant founded on the judgment against W. & R. related back to the date of the judgment, October 26, 1841; and that before it could so relate back, they must find that W. had a deed from I. conveying to him the legal title to the premises in controversy, for a valuable consideration, duly executed and acknowledged, at or before the date of said judgment; *Held*, That the court erred in requiring the defendant to show that the deed from I. to W. had been acknowledged. *Ib.*

ACTION.

1. It is the duty of the court, to determine the character of the action—by what rules and principles it is to be governed—and not leave it uncertain and confused, whether the law it is enunciating applies to the case at bar, or some other. *Center v. Spring*, 393.

2. Sections 1846 to 1851 of the Code, inclusive, were intended to draw the line, and recognize the distinction, between actions *ex contractu* and actions *ex delicto*. *Johnson & Stevens v. Butler*, 535.

3. Sections one and three of the act allowing and regulating writs of attachment, approved February 16, 1843, recognize the distinction between actions *ex contractu*, and actions *ex delicto*. *Ib.*

4. When a judgment has been recovered for a *tort*, it then is fixed and certain, and is a *debt*, as much as if it were recovered upon a promise; and an action brought upon such a judgment, under the present, as well as the former practice, is an action *ex contractu*. *Ib.*

ADJOURNMENT.

1. It is not necessary that a transcript from the District Court, should show affirmatively, when, or how, or under what circumstances, the regular term of that court was adjourned. *Sharp v. The State*, 454.

AD QUOD DAMNUM.

1. The act authorizing the erection of mill dams, approved January 24, 1854, does not require that the petition for a writ of *ad quod damnum*, should be sworn to, and if the petition is signed by the counsel of the applicant, that is sufficient. *Gammell v. Potter*, 562.

2. Notice of the application for the writ, with a copy of the petition, must be served upon the defendant, before the petition is filed; and proof of service, by affidavit, must be filed with the petition. *Ib.*

3. Where in a proceeding of *ad quod damnum*, the jury summoned by the sheriff, found that "the proposed dam will overflow twenty acres of the lands of the defendant; that by reason thereof, the said defendant will sustain damage to the amount of \$654, and do therefore appraise his damage at that amount; that the lands of no other person would be affected by said dam; and that no dwelling-house, out-house, garden, or orchard, of the said defendant, or any other person, would be overflowed, or injuriously affected thereby;" *Held*, That the inquisition was not only substantially, but technically and formally, correct. *Ib.*

ADJUDICATION.

1. Where, in an action of right to recover the possession of real estate, brought by the party holding the *legal* title, the defendant set up a defence, impeaching the patent under which the plaintiff claimed, and the court decided against the defendant, on the ground that his defence was *equitable* merely, and could not be set up as a defence against the legal title, in that action; and where the defendant subsequently, brought a suit in chancery to set aside the patent of the former plaintiff, on the ground of fraud; *Held*, That the former suit was not a prior adjudication of the validity of the patent. *Arnold v. Grimes and Chayman*, 1.

AFFIDAVIT.

1. A motion to compel a party to produce a paper, the existence of which is

not shown by the record, must be supported by an affidavit, showing the requisite facts. *Johnson & Stevens v. Butler*, 535.

2. But whether such an affidavit is required, when the record does show the former existence of such paper, *quere?* *Ib.*

AMENDMENTS.

1. The legislature possessed the power to amend the practice in relation to pleadings in chancery, so that amendments may be permitted, which had not before been allowed. *Brink v. Morton et al.*, 411.

2. Sections 1756 to 1759 of the Code, inclusive, apply to proceedings in equity, as well as at law. *Ib.*

ANSWER.

1. Where the denials in an answer in chancery, are positive and unequivocal, and made under oath, they must be overcome by the testimony of two credible witnesses, or other evidence of equivalent weight and force. *Pierce v. Wilson et al.*, 20.

2. Where in a suit in chancery to enforce the specific performance of a contract to convey real estate, one of the respondents filed an answer not under oath, to which a replication was filed, and the cause was then continued; and where at a subsequent term, and after depositions had been taken, the respondent was permitted, against the objection of the complainant, to file an amended and sworn answer; *Held*, That the court did not err in allowing the answer to be filed. *Brink v. Morton et al.*, 411.

3. Where the record contained a demurrer to an answer, and a replication, but no answer was found in, or otherwise referred to by, the record; *Held*, That the evidence was insufficient to warrant the appellate court in holding that the defendants did answer in the court below. *The State v. Foster*, 559.

APPEAL.

1. Section thirteen of the act entitled "An act to incorporate Iowa City," approved January 24, 1853, which provides that appeals to the District Court in the same county, shall be allowed from the judgments and decisions of the mayor, in the same cases, time and manner, as may at any time be allowed by law from those of other justices, and they shall be tried as in other cases, is not restrictive, but confers a general right of appeal. *Conboy v. Iowa City*, 90.

2. Appeals from the judgments of the mayor of Iowa City, may be taken by any person aggrieved; but, in similar cases, they must be taken in the same time, and in the same manner, as appeals are taken from a justice of the peace. *Ib.*

ARBITRATION.

1. In cases of arbitration, the Code gives the parties the power to agree upon the rules that are to govern the arbitrators. *Thompson v. Blanchard*, 44.

2. And where in an action on an award, the admission of the award in evidence was objected to, on the ground that it was not signed by all the arbitrators, and it appeared that the agreement of submission provided, that the award of a majority should be as binding as if made by the entire number; *Held*, That this was one of the rules which the parties had prescribed in the settlement; and that, therefore, if, independent of such agreement, the award was legally defective (which is not conceded), the objection was not well taken. *Ib.*

3. Where matters are considered by arbitrators which were not submitted—

where they have committed such material errors or mistakes as prejudice either party—or where they omit to consider matters which were submitted—for these, and other causes, as well as for fraud, the award may be rejected by the court to which it is returned, or impeached when an action is brought to enforce it. *Ib.*

ARREST OF JUDGMENT.

1. Where the plaintiff in error, on the 18th day of April, 1856, was indicted for murder in the Delaware District Court, and on the same day was arraigned, and obtained a change of venue to the county of Dubuque; and where, after the venue was changed, the clerk of the court made out a certified copy of the record entry, the finding of said indictment, defendant's application for the change of venue, and the order granting the same, which transcript, together with the indictment, and other papers, were placed in an envelope, and by the clerk of said Delaware District Court, presented and filed, in term time, in the Dubuque District Court, the clerk of the latter court indorsing the filing of the same with him, on the outside of the envelope; and where the indictment was not attached or annexed to the transcript, nor were any papers so deposited by the clerk of Delaware county, marked as filed in the Dubuque District Court, except by the indorsement of filing made on said envelope; and where it appeared from the record, that the indictment was found at the "March term, 1856, of the Delaware District Court, begun and held by adjournment, on the 15th day of April, 1856," and that it had been regularly presented as a true bill by the grand jury, and regularly marked as filed by the clerk of that court, as required by the Code; and where the defendant at the ensuing May term of the Dubuque District Court, was tried and found guilty of murder in the second degree, and after verdict, filed his motion in arrest of judgment, on the ground that the Dubuque District Court had no jurisdiction over the case, and that, under the circumstances, it was irregular to put the defendant on his trial, which motion was overruled; *Held*, That these objections could not avail after verdict, and that the motion was properly overruled. *Sharp v. The State*, 454.

ASSIGNMENT.

1. Section 1676 of the Code, which provides that civil actions must be prosecuted in the names of the real party in interest, has reference, at least in part, to sections 949 and 952, which make claims assignable by writing, which before were not, so as to enable the assignee to sue in his own name. *The State v. Butterworth*, 158.

2. Is a claim for a tort, assignable, *quere?* *Ib.*

3. An assignment of error as follows: "In overruling various other motions and questions apparent upon the record, which is made part and parcel of this assignment of error," is too broad and indefinite to be considered by the Supreme Court. *Santo et al. v. The State*, 165.

ATTACHMENT.

1. Where in an action, commenced by attachment, on a judgment recovered in another state in an action of replevin, the defendant moved to quash the attachment, because the writ had not been allowed as required by section 1851 of the Code, which motion was sustained, and the writ quashed; *Held*, That the court erred in quashing the attachment. *Johnson & Stevens v. Buller*, 535.

AWARD.

1. The whole burden of proof is on the party who attacks an award; it is

for him to clearly satisfy the jury of any mistake, as also, that he was prejudiced thereby. *Thompson v. Blanchard*, 44.

2. Unless some material error or defect is apparent on the face of an award, it cannot be avoided, unless the other errors or defects complained of, are shown fully and clearly. *Ib.*

3. Where matters are considered by arbitrators which were not submitted—where they have committed such material errors or mistakes as prejudice either party—or where they omit to consider matters which were submitted—for these and other causes, as well as for fraud, the award may be rejected by the court to which it is returned, or impeached when an action is brought to enforce it. *Ib.*

BILL OF EXCEPTIONS.

1. Where, in the Supreme Court, the appellee moved to dismiss the appeal, and affirm the judgment, for the reason, that the transcript contained no bill of exceptions, to show the error complained of in the proceedings and judgment of the court below; *Held*, That the fact that there was no bill of exceptions, did not necessarily preclude the possibility that there was error in the record, not necessary to be shown by a bill of exceptions, and the motion was overruled. *Redman v. Williamson et al.*, 488.

2. A bill of exceptions makes that a part of the record, which, without it, would not be. If the error appears without it, there need be no bill of exceptions. *Ib.*

3. The question as to the correctness of a decision of the District Court, must first be raised in that court, by bill of exceptions, before it can be passed upon by the appellate court. *The Western Stage Co. v. Walker*, 504.

BOAT.

1. An action against a steamboat, under chapter 120 of the Code, is a proceeding *in rem*. *Ham v. Steamboat Hamburg*, 460.

2. In order to give the court jurisdiction in such cases, it is necessary that the warrant issue, and seizure of the boat be made, as required by section 2121 of the Code. *Ib.*

3. And where a proceeding was commenced against a boat, and the notice was returned, with the following service: "Served, this 12th day of June, 1855, the within notice on the within named steamboat Hamburg, by reading the within notice to Capt. Estes personally, who is at present master of said boat, and by leaving with him a copy of the written notice;" and where no warrant was issued, and there was no evidence that the boat was taken into the possession of the officer; *Held*, That the court properly dismissed the action, on motion, on the ground that the boat was not attached in accordance with law. *Ib.*

4. In an action against a boat, for labor and materials furnished, a petition which alleges that such labor and materials were furnished at the instance and request of the said boat, is sufficient. *West & Co. v. Barge Lady Franklin*, 522.

5. The petition, in such a case, need not allege that the work was done, or materials furnished, on a contract made with the master, owner, agent, clerk, or consignee, of said boat. *Ib.*

BOND.

1. In an action on a penal bond, before a justice of the peace, no petition is necessary; nor is it necessary that the docket entry of the justice, should show and specify the breaches of the bond, of which the plaintiff complains. *Stone v. Murphy*, 35.

2. Where in an action on a penal bond to secure the payment of attorney fees, the plaintiff, at the time of commencing his suit, deposited the bond, together with a bill of items of the services rendered, with the justice, which bond the justice failed to mark filed; and where on the day set for the trial, one of the defendants appeared, and moved to dismiss the cause, because the plaintiff's bill of items did not charge any indebtedness against him, and the plaintiff thereupon withdrew his bill of items, and made affidavit that he supposed that said bond had been filed, and was in the hands of the justice, until at the time set for trial, he was informed by the justice, that he had not filed the same; and asked leave to proceed on the oral pleadings, which leave was granted, and thereupon the defendant withdrew, and made no further defence; *Held*, 1. That the failure of the justice to mark the bond filed, could not prejudice the rights of the plaintiff; and that if such previous filing had been overlooked, and it became necessary to indorse the bond as filed, it was not only the right, but the duty, of the justice, to make such indorsement *same pro tunc*. 2. That the plaintiff did right in filing his account with the bond, and if the justice, by his ruling, on the defendant's motion, committed an error against the plaintiff, the defendant cannot complain. *Ib*.

CHARITIES.

1. By the common law, all grants between individuals must be made to a grantee in existence, or capable of taking, otherwise there could be no such thing as livery of seizin. *Miller v. Chillenden et al*, 315.

2. But this rule does not apply to grants or devises to charitable or benevolent purposes, and especially where the legal estate is vested in trustees, to hold for the use of the contemplated charity. *Ib*.

3. In such cases, if the intent of the donor can be ascertained, and it be legal, courts of equity will carry it out. *Ib*.

4. The exercise of jurisdiction by courts of chancery in cases of grants or devises to charities, is not dependent upon the statute of 43 Elizabeth, commonly known as the statute of charitable uses. *Ib*.

5. In this country, the jurisdiction of courts of equity over charities, must be exercised judicially, and not as a prerogative power. *Ib*.

6. If the intention of a donor can be legally executed, whether the gift is to a general charity, or to a specific object, it will be done; but if this cannot be accomplished, the claim of the heir will not be defeated, by appropriating the property to another and different object. *Ib*.

COMMON COUNTS.

1. Where a party declares specially, he must succeed upon his special case and cannot recover as upon the common counts. *Eyser v. Weissgerber*, 463.

2. Where a party would recover for the reasonable value of services rendered, or materials furnished, upon a special contract, he must either declare in general assumpsit, or unite the common, with the special counts. *Ib*.

CONSIDERATION.

1. The surrendering of a note, or the compromise of a suit, is a sufficient consideration for a bond. *Mansfield v. Watson*, 111.

2. A promise to pay more than ten per cent. interest, under the statute of 1843, is without consideration, and void. *Sullivan v. McLennan*, 437.

CONSTITUTION.

1. The act entitled "An Act for the Suppression of Intemperance," ap-

proved January 22, 1855, is not in conflict with the constitution or laws of the United States. *Santo et al. v. The State*, 165.

2. The statute does not embrace more than one object, nor objects not expressed in the title; and is not in violation of the twenty-sixth section of the first article of the constitution, which provides that every law shall embrace but one object, which shall be expressed in the title. *Ib.*

3. The act has been published, as required by the constitution of the state of Iowa. *Ib.*

4. The act entitled "An Act in relation to certain state roads therein named," approved January 22, 1853, is constitutional. *The State of Iowa ex rel. Weir v. The County Judge of Davis Co.*, 280.

5. In determining whether a law is constitutional, under section twenty-six of the third article of the constitution, which declares that every law shall embrace but one object, which shall be expressed in the title, the unity of object is to be looked for in the ultimate end designed to be attained, and not in the details leading to that end. *Ib.*

6. Section eighteen of the first article of the constitution of the state of Iowa, which provides that private property shall not be taken for public use, without just compensation, means that the person whose property is so taken, shall have a *fair equivalent in money*, for the injury done him by such taking. *Henry v. The Dubuque and Pacific Railroad Company*, 288.

7. The term "damages," in the fourth section of the act entitled "An act granting to railroad companies the right of way," approved January 18, 1853, has relation to the provision of the constitution under which the property may be taken, and is *precisely synonymous* with the phrase "just compensation," there used. *Ib.*

CONSTRUCTION.

1. Although the power of the judiciary to declare and hold an act of the legislature unconstitutional and void, is universally admitted, yet the exercise of that power, is considered of the most delicate and responsible nature, and is not to be resorted to, unless the case be clear, decisive and unavoidable. *Santo et al. v. The State*, 165.

2. It is the duty of the courts, to give to a statute such a construction, if possible, as will sustain it. *Ib.*

3. Where the language and provisions of a statute are consistent with a lawful end, and this is its apparent meaning, whilst another construction would give it an unlawful effect, it is the duty of a court to take that view which is lawful and consistent. *Ib.*

4. It is the duty of the courts to give such a construction to an act, if possible, as will avoid the necessity of exercising the power of declaring an act of the legislature void, and uphold the law. *The State of Iowa ex rel. Weir v. The County Judge of Davis Co.*, 280.

CONTEMPT.

1. In the absence of statute law, each court of record is the sole and final judge in matters of contempt. *The First Cong. Church of Bloomington v. The City of Muscatine*, 69.

2. A proceeding to enforce a penalty for disobedience to the process of injunction, is not a chancery suit, nor necessarily a part of one. *Ib.*

3. The proceeding to punish a contempt of process, though based upon, is merely incidental to, and, to a great extent, independent of, the original proceeding, in which it may be evoked. *Ib.*

4. And such proceeding need not be entitled as of the original cause. *Ib.*

5. The contempt may be punished, whether the injunction be regularly issued or not, and the court will not look into the merits of the cause in which the injunction issued. *Ib.*

6. The proceeding is, in its nature, criminal, to punish a disobedience to civil authority. *Ib.*

7. The proceedings of a special and independent character, mentioned in section 1555 of the Code, refer to the primary proceedings specially provided for in several independent chapters of the Code, such as informations, mandamus, injunctions, and the like, but not to contempts, which may be incident to all. *Ib.*

8. A proceeding against a corporation for contempt, is necessarily personal; that is to say, the corporation, as such, cannot be imprisoned, but those acting in aid of it, violating the injunction, may. *Ib.*

9. The special provision contained in section 1606 of the Code, denying an appeal from an order to punish for a contempt, controls the general provisions regulating appeals, and extends to contempts by a disobedience of an injunction, as well as to other process. *Ib.*

10. Whether a *certiorari* will lie from an order refusing to punish for a contempt, *quere?* *Ib.*

11. In cases of contempts, the provision of the Code is positive, that where the action of the court is founded upon evidence given by others, the evidence must be reduced to writing, and be filed and preserved; and where the court acts upon its own knowledge, a statement of the facts, must be entered upon the record. *Skiff v. The State*, 550.

12. The power to punish for contempt is a necessary one, but at the same time should be carefully exercised, in strict accordance with law, and a due regard for the rights of those charged. *Ib.*

13. Where the only record in a case of contempt, was the following: "Harvey J. Skiff fined for contempt of court, fifty dollars. For a second contempt, one hundred dollars, and ordered to be committed to jail for three days. Mitimus issued to sheriff of Polk county, to confine said H. J. Skiff in the jail of said county for three days," the party was discharged from custody and from the fines adjudged against him. *Ib.*

CONTINUANCE.

1. Causes are to be tried in the order of their commencement, and at the first term thereafter, unless reasonable cause for a continuance, or change of such order, be shown. *Purington v. Frank*, 565.

2. In determining applications of this character, much must necessarily be left to the discretion of the court, but that discretion should be governed and controlled by legal rules, and not arbitrarily, nor in violation of prescribed rules, or the manifest rights of parties. *Ib.*

3. Where both an action at law, and a proceeding in chancery, between the same parties, and about the same subject matter, is pending in the same court, it is not an improper exercise of discretion, to postpone the trial of that suit which depended upon strict legal right, until those equities which the defendant had been compelled to set up in a separate action, could be heard and determined. *Ib.*

4. In case of such postponement, however, the defendant should be required to prosecute his suit in equity, with diligence; and when he fails in this respect, the action at law might properly be tried. *Ib.*

CONTRACTS.

1. Where a bill in chancery to enforce the specific performance of a contract

to convey land, in which time was of the essence of the contract, alleged that the respondent had waived the performance of the contract as to time, and set up a contract as follows: "In April, 1854, in a conversation had at Bellevue, your orator informed said W. (the agent of respondent), that your orator had become the assignee of said B. (with whom the contract was made), in the contract aforesaid, and said W. agreed to wait on your orator for several months for payment of said note (the note given for the price of the land), and that he would convey the said land to your orator, on payment of said note and interest, providing that all the taxes were paid," as evidence of the waiver; and where the bill alleged further, that the complainant had paid all the taxes on the land; *Held*, That the subsequent contract alleged, was without mutuality or consideration, and was not sufficient to revive, and extend the time, on the original contract. *Tomlinson v. Smith et al.*, 39.

2. Where a party contracted to deliver, at a specified time and place, a certain quantity of pine logs, at a given price; *Held*, In an action on the contract, that there was nothing in the contract which tended to show, that any other than the ordinary liability was stipulated for. *Cannon v. Folsom*, 101.

3. As mere moderate drunkenness does not deprive the mind of the power of rational consent, and is not always apparent to others; it does not, of itself, avoid a contract. *Mansfield v. Watson*, 111.

4. Where, in an action for materials furnished, and work and labor performed, the petition stated that the parties entered into a contract, by which the plaintiff undertook to furnish materials and perform work and labor for a building, agreeably to a certain account or statement in writing, a copy of which is attached to the petition; and where the account or statement in writing, attached to the petition, was a bill of prices for certain described materials and work, and was signed by the parties, but contained no undertaking by either, nor any stipulation of any character; and where the court instructed the jury, that there was no written contract between the parties; *Held*, That the statement or account did not possess the first ingredient of a contract, and that the instruction was correct. *Eysse v. Weissgerber*, 463.

5. It is the duty of a court to determine, and so inform a jury, whether a writing introduced in evidence, is, or is not, a contract, or that which fixes the liability of the parties in the premises. *Ib.*

6. Where a party would recover for the reasonable value of services rendered, or materials furnished, upon a special contract, he must either declare in general assumpsit, or unite the common, with the special counts. *Ib.*

7. Whether, if a contractor abandons his contract, without the fault of the employer, he can recover what the work done is reasonably worth, under a proper petition, *quere?* *Ib.*

8. Where the materials, work, time, and manner of performance, are contained in a special contract, but the price to be paid is not fixed, it is proper to set forth the contract, and seek to recover what the services and materials are reasonably worth. *Ib.*

9. Where, in an action on a contract, in which the plaintiff agreed that he would do the necessary filling and cutting to reduce and elevate the present actual surface of that part of Mineral street, in the city of Dubuque, &c., to a surface which shall correspond with a certain grade, the work to be done under the supervision and direction of the city engineer or the street commissioner, for which the city was to pay a specified price; and the court instructed the jury, that as the contract provided that the work should be done under the supervision and direction of the city engineer or street commissioner, and that the plaintiff should be paid under the estimates of the city engineer, if the work was done under the direction of either of these officers, the plaintiff was entitled to receive pay according to the estimates of the city engineer, unless it be shown that the estimates are incorrect; that the jury have a right to examine these estimates, and if they should be found to be based upon any mistake of fact, or any erroneous principle of engineering,

they may be set aside; and that if the estimate of the engineer is the proper one, they may adopt it; and where the defendant asked the court to instruct the jury, that they will not allow for any excavation below the authorized grade as fixed by the contract, which the court refused, and held, that if the excavation was done under the direction of the city engineer or street commissioner, it might properly be considered by the jury; *Held*, 1. That the contract was substantially a contract to make the street of a certain grade, in the best manner, under the direction of the officers; and, 2. That the court did not err in giving or refusing the instructions. *Blake v. City of Dubuque*, 492.

10. The transportation of passengers in a mail coach, is not embraced in a contract for carrying the mail, but is an independent matter of private speculation and benefit. *Weld v. Chapman*, 524.

CONVERSION.

1. To maintain an action for the conversion of property, there must be property in the plaintiff, and also a right to the possession, at the time of the conversion. *Cutter v. Fanning*, 580.

2. There must, also, be a conversion of the thing by the defendant, to his own use. *Ib.*

3. It is not material whether the defendant came to the possession originally, by right or by wrong; and the conversion may be either direct or constructive. *Ib.*

4. Where the circumstances, of themselves, do not amount to an actual conversion, it will be incumbent on the plaintiff, to give evidence of a demand and refusal, prior to the commencement of his action. *Ib.*

5. The demand may be either of the chattel itself, or its value. *Ib.*

6. The value of the property, at the time of the conversion, with interest, is the measure of damages, where there is no claim for special damages. *Ib.*

7. The refusal to comply with a demand, where the plaintiff requires a much larger sum than is his right, is not conclusive evidence of a conversion. The effect of such refusal, must depend upon the manner of the refusal, and the attendant circumstances. *Ib.*

8. If the defendant makes no objection to the amount demanded, and does not place his refusal to pay on that ground; or does not himself offer to pay anything, the jury may conclude that the demand and refusal, are sufficient. *Ib.*

9. An offer to return property, at a distance from where it was taken, will not bar an action for the conversion. *Ib.*

CONVICTION.

1. Where certain intoxicating liquors were seized under the act for the suppression of intemperance, and the owner appeared and pleaded as a bar to the complaint and prosecution, a previous conviction of himself, for keeping said liquors for sale; *Held*, That the conviction of the owner for keeping, with intent to sell, is not a bar to a prosecution against the liquors themselves, as a nuisance, and for the abatement of the nuisance. *Sanders v. The State*, 230.

COSTS.

1. Where judgment was rendered against a defendant, by a justice of the peace, from which he appealed, and in the District Court, at the time the jury was being called, the defendant offered to pay the plaintiff ten dollars, which was refused; and where the plaintiff obtained a judgment for ten dollars, the amount proffered by the defendant, which was a less sum than that recovered before the justice, and the court thereupon ordered the plaintiff to pay the costs

of the defendant; *Held*, That by section 2346 of the Code, the defendant was required to proffer to pay a certain amount, *with costs*; and that not having done so, and the sum proffered being the amount the plaintiff finally recovered, the plaintiff was entitled to a judgment for the verdict, with costs. *Powell v. Western Stage Co.*, 50.

2. The applicant for a change of venue, in addition to the costs of the transcript, should be required to pay the fair and legitimate costs of the term. *Allen v. Skiff*, 433.

CO-TENANT.

1. Where one co-tenant purchases in an incumbrance or adverse title, he is ordinarily held to do so, for all the co-tenants; but this doctrine does not apply to the case of co-occupants of the lands of the general government, where one shall have acquired title from the United States, in the absence of fraud, or special contract. *Sullivan v. McLennan*, 437.

2. A tenancy in common can only be destroyed, either by uniting all the titles and interest in one tenant—thus bringing all the interests into one severalty; or by partition—giving all respective severalties. *Id.*

COUNTY AGENT.

1. The effect of the statute, entitled "An act to repeal an act to authorize the appointment of a county agent in and for the county of Johnson," approved February 24, 1847, was only to appoint the clerk of the board of county commissioners as agent of the county, for selling lots and making deeds. *Gourley v. Hankins*, 75.

2. The clerk does not perform these acts as clerk, but as agent. *Id.*

3. The repeal of the act entitled "An act to authorize the appointment of a county agent in and for the county of Johnson," approved February 16, 1842, by the act approved February 24, 1847; did not remit the clerk of the board of county commissioners to the general act, entitled "An act to authorize boards of commissioners to appoint agents to dispose of real estate," approved February 17, 1842, for his powers and duties; but he still derives those powers from, and finds those duties defined in, the act of February 16, 1842. *Id.*

4. The repeal of the act of February 16, 1842, by the act of February 24, 1847, must be construed as a repeal of the former act, so far as it gave the power to appoint a county agent, but not so far as it conferred authority upon the agent. *Id.*

5. The repeal is, in effect, a repeal of the act of February 16, 1842, *saving* certain rights or powers under it. *Id.*

COUNTY JUDGE.

1. A county judge, elected at an April election, to fill a vacancy occasioned by the removal of his predecessor before the expiration of his term of office, does not acquire the right to hold the office for the term of two years. *Davis, Pros. Atty. v. Best*, 96.

2. The words "two years" in section three of the act entitled "An act to require county judges to give bond," approved January 29, 1853, are to be taken in contradistinction to the words "four years" in section 103 of the Code, creating the office of county judge, and are not intended to apply to the filling of vacancies in that office, or to alter the law on that subject. *Id.*

3. A county judge elected to fill a vacancy, is only entitled to serve out the unexpired term of his predecessor. *Id.*

CREDIT.

1. Generally, a defendant is not bound to prove the correctness of a credit, indorsed upon the cause of action. *Thompson v. Blanchard*, 44.

2. Where an action was brought on an award, on which there was a credit of \$283.20, and the plaintiff in his petition stated, that \$67 of the credit so indorsed, was a mistake; that upon the agreement of defendant, that plaintiff should have a certain lot of lumber to that amount, he consented to give him the credit, but that defendant had refused to let him have the lumber—had appropriated the same to his own use—and that the credit was, therefore, to that amount incorrect, which averments were not denied by the answer; and where the court instructed the jury, "that they were not bound to take into consideration any credit indorsed on the award, if the defendant has failed to prove the same." *Held*, That the averments in the petition in relation to the mistake in the credit, not being denied, were to be taken as admitted, and with reference thereto, the instruction was not erroneous; and that as to the balance of the credit, the instruction was erroneous, but that, as it appeared from the record, that the jury allowed the balance of the credit in making up their verdict, no prejudice had resulted to the defendant. *Ib.*

CRIMINAL LAW.

1. Section 2582 of the Code, was intended to cover those cases of defilement, in which there is no force, except that which is constructive, and in which the act is accomplished principally by menace or duress, acting to subdue the will. *Pollard v. The State*, 567.

2. The offence consists in doing the act against the will of the other person, with force, menace, or duress. *Ib.*

3. The offence differs but little, if any, from rape, and embraces those acts in relation to which it is sometimes doubtful whether they constitute the crime of rape. *Ib.*

4. The nature of the case, does not call for affirmative evidence of consent, on the part of the defendant, but evidence of *dissent* and *repulsion*, on the part of the state; or, in other words, the defendant, in order that he may be held not guilty, is not obliged to show an affirmative act of consent. *Ib.*

5. It is within the province of the court, to instruct the jury whether the facts proved, if believed, constitute the offence charged. *Ib.*

CY PRES.

1. The doctrine of *cy pres*, at least in its original form, as administered in the English courts, has no application in this country. *Miller v. Chittenden et al.*, 315.

DECREE.

1. When a decree in chancery is offered in evidence, the court can look so far back as the *bill*, in order to ascertain from that, with the decree, what the court determined; but it cannot look at the testimony, with a view of ascertaining whether there was sufficient evidence to authorize such decree of the court. *Arnold v. Grimes & Chapman*, 1.

DEDICATION.

1. Where S. being the owner of certain real estate, laid out the town of Pella, caused a plot or map to be made and certified, and on the 5th of June,

1848, acknowledged it and caused it to be recorded, under the act of January 29, 1839—on the plot of which, certain squares were denominated, East Market square, West Market square, Garden square, and *Church square*; and where the plaintiff brought an action to recover the possession of the piece of ground denominated Church square, alleging in the petition, that the defendant caused this parcel of ground to be marked Church square, *thereby* dedicating and granting it to said Christian church at Pella; that on the 5th of June, 1848, there existed an association or organization of the members of said church at the said town of Pella, and avers an incorporation on the 2d of December, 1849; that said church had a valid, subsisting interest in the property; that it had a right to the immediate possession thereof, and to the ownership in fee simple; and praying that plaintiff may recover the immediate possession of the said square, and one hundred dollars' damages for the detention thereof; *Held*, That the plaintiff had no legal title, of any kind, to the premises, nor any exclusive right therein. *The Christian Church at Pella v. Scholle*, 27.

2. Whether dedications for church purposes, and especially those to charitable purposes, require a trustee, *quere?* *Ib.*

3. Whether the grantor can revoke such dedications, *quere?* *Ib.*

4. Whether the trust is not in the body corporate, for execution, *quere?* *Ib.*

5. Where a lot of ground is dedicated to church purposes generally, whether any one church has a right in the property dedicated, until such right is appointed to them by the proper person or body, *quere?* *Ib.*

DEED.

1. Where, by a suit in equity, a deed was decreed to be canceled and held for naught, on the ground that it was obtained by fraud and duress; *Held*, 1. That the deed was void *ab initio*; and that the decree did not make the deed void, but only declared it so. 2. That even if the deed was not invalid and inoperative *ab initio* as to all persons, but only from the rendition of the decree; yet, as to the party who obtained the deed by duress and fraud, the decree would have a retroactive effect, and the deed was absolutely void as to him. *Arnold v. Grimes & Chapman*, 1.

2. Parol evidence is not admissible to change an absolute deed into one of trust, unless there be fraud, accident or mistake, alleged and proved. *Ratiff et al. v. Ellis*, 59.

3. Where in an action of right, the defendant, to prove title in himself to the premises, offered in evidence a deed, purporting to have been executed by the county of Johnson, concluded and signed as follows: "In testimony whereof, I, Stephen B. Gardner, agent of the county of Johnson, in the state of Iowa, have hereunto set my name, this 9th day of February, A. D. 1848. Stephen B. Gardner, agent of J. C.," and offered to prove by parol testimony, that said Gardner, at the time of the execution of said deed, was clerk of the board of county commissioners of Johnson county, which testimony was rejected, and the court refused to admit the deed in evidence; *Held*, 1. That the oral testimony offered, as well as the deed, were improperly rejected. 2. That the parol testimony offered, did not tend to change or alter the deed. 3. That the agent had power, under the act of February 16, 1842, to make the deed. *Gourley v. Hankins*, 75.

4. In order to authorize a court of equity to treat an absolute deed as a mortgage, it is necessary to show a debt existing between the parties at the time of the transaction, and that the title to the land passed from one to the other. *Usher v. Livermore*, 117.

5. A party seeking to enforce the specific performance of a contract to convey real estate, is not required to tender a deed to the respondent for execution, before bringing his suit. *Young v. Daniels*, 126.

6. Where a party has actual notice of the existence of a deed, he is affected

by it even though no certificate of acknowledgment is indorsed on the deed. *Miller v. Chittenden et al.*, 315.

7. Section thirty-one of the act of 1840, entitled "An act to regulate conveyances," makes a deed valid between the parties, and such as have actual notice thereof. The want of the acknowledgment, or of the proof which may authorize the admission of the deed to record, does not invalidate the deed as between the grantor and grantee, and is good as to all persons who are charged with such notice. *Blain v. Stewart*, 378.

8. The acknowledgment and record of the deed, are provisions which the law makes for the security of creditors and purchasers—they are not essential to the validity of the deed as to the grantor. *Id.*

9. Where in an action of right, the plaintiff claimed title to the premises under a deed from one I., dated March 13, 1853, and where the defendant claimed title under a judgment in the District Court against W. and R., rendered October 26, 1841, a sale of the premises on execution, as the property of W., and a sheriff's deed, dated May 6, 1843, and showed by the testimony of W., that he purchased the premises of I.; that I. conveyed to him by warranty deed; and that W. afterwards (March 31, 1842) conveyed to B., T. & B., of St. Louis, of which firm the plaintiff was a partner, and delivered to their agent, the deed from I. to himself, to be placed upon record; and where the defendant further proved by I., that he sold the premises to W. about the year 1841 or 1842, and thinks that he conveyed the same by deed; that witness afterwards, at the request of B., T. & B., took up the deed he had made to W.—the same never having been recorded—and made a deed directly to B., T. & B., dated February 25, 1843; that the deed to W. is lost, or was destroyed by the witness, and never was upon record; and that in March, 1853, he executed the deed given in evidence by plaintiff; and where the plaintiff, to rebut this testimony, gave in evidence the deed from W. to B., T. & B., dated March 31, 1842, and the deed from I. to them, dated February, 25, 1843, and proved that B., T. & B. obtained the deed from I. directly to themselves, to save circuitry of title through W., and that in the spring of 1853, the plaintiff finding a defect in the acknowledgment of the deed from I. to B., T. & B., and being the survivor of the partnership, which had been dissolved, procured from I. the deed, dated March 13, 1853, to be made directly to himself; and where, upon this state of evidence, the court instructed the jury, that the plaintiff was entitled to recover, unless the title of defendant founded on the judgment against W. & R. related back to the date of the judgment, October 26, 1841; and that before it could so relate back, they must find that W. had a deed from I. conveying to him the legal title to the premises in controversy, for a valuable consideration, duly executed and acknowledged, at or before the date of said judgment; *Held*, That the court erred in requiring the defendant to show that the deed from I. to W. had been acknowledged. *Id.*

10. In November, 1842, W. W. C. was seized in fee simple absolute of certain real estate, which was sold on execution against him, and purchased by defendant, who received a sheriff's deed therefor, on the 24th day of August, 1844. On November 26, 1844, W. W. C. executed to A. C. a general power of attorney to sell lots and make conveyances, which was recorded April 12, 1843, on the back of which was the following, signed and sealed, by the wife of the said W. W. C.: "Know all men by these presents, that I, C. C., wife of W. W. C., the grantor in the within power of attorney, for the purpose of enabling A. C. more fully to carry into effect the authority therein to him granted, do hereby remise, release, and quit claim, unto any person or persons, their heirs and assigns, to whom the said attorney so constituted, shall convey the land and premises in the said letter of attorney mentioned, all my right, title, interest, claim, and demand, to said land," which bears date, November 26, 1842, and the certificate of acknowledgment to which, is as follows: "On the 26th day of November, 1842, before me, G. L. N., a justice of the peace in and for said county, came C. C., wife of W. W. C., and

on examination, separate and apart from her husband, acknowledged that she executed the above instrument freely and voluntarily, without threat or compulsion of her said husband." No conveyance was made under the power of attorney. On the 13th of October, 1845, W. W. C. conveyed the premises, by deed of general warranty, to A. C., in which deed the said wife did not join, and which was recorded November 13, 1845. On the 2d of February, 1846, A. C. mortgaged said premises to E. C., which was filed for record, April 8, 1856; and on the 8th of April, 1846, said A. C. conveyed to E. C. the equity of redemption in said premises, which was recorded June 1, 1846. On September 26, 1845, A. C. conveyed said premises, by general warranty, but to whom is not stated, which conveyance was filed for record December 6, 1851; and on September 20, 1848, E. C. conveyed all of said premises to C. O., the wife, which deed was filed for record, October 23, 1851. W. W. C. died April 28, 1854. *Held*, 1. That as A. C. did not make any conveyance under the letter of attorney, and none till after W. W. C. conveyed to A. C., in which deed the wife did not join, and as the deed from A. C. to E. C. was made in his own right, there was no release of the wife's interest in the premises. 2. That the deed from E. C. to the wife, conveyed no title, for the reason that W. W. C. had no title when he conveyed to A. C. who subsequently conveyed to E. C. 3. That the defendant, by his purchase under the execution, took the title of W. W. C. *Corriell v. Ham*, 552.

DEFAULT.

1. The defendant in a criminal case, is not required to appear until he is called, or his presence demanded by the court; and a default cannot properly be entered against him until he is called. *The State v. Gorley and Cloud*, 52.
2. While a compliance with any technical form in the entry of defaults in criminal cases before justices of the peace, should not be required, the record should show that in some method, the defendant had an opportunity to know that his presence was demanded and required. *Ib.*

DEFILEMENT.

1. Section 2582 of the Code, was intended to cover those cases of defilement, in which there is no force, except that which is constructive, and in which the act is accomplished principally by menace or duress, acting to subdue the will. *Pollard v. The State*, 567.
2. The offence consists in doing the act against the will of the other person, with force, menace, or duress. *Ib.*
3. The offence differs but little, if any, from rape, and embraces those acts in relation to which it is sometimes doubtful whether they constitute the crime of rape. *Ib.*
4. The nature of the case does not call for affirmative evidence of consent, on the part of the defendant, but evidence of dissent and repulsion, on the part of the state; or, in other words, the defendant, in order that he may be held not guilty, is not obliged to show an affirmative act of consent. *Ib.*
5. It is within the province of the court, to instruct the jury whether the facts proved, if believed, constitute the offence charged. *Ib.*

DEMAND.

1. Where the circumstances of themselves do not amount to an actual conversion, it will be incumbent on the plaintiff to give evidence of a demand and refusal, prior to the commencement of this action. *Cutter v. Fanning*, 580.
2. The demand may be either of the chattel itself, or its value. *Ib.*
3. The refusal to comply with a demand, where the plaintiff requires a much

larger sum than is his right, is not conclusive evidence of a conversion. The effect of such refusal, must depend upon the manner of the refusal, and the attendant circumstances. *Ib.*

4. If the defendant makes no objection to the amount demanded, and does not place his refusal to pay on that ground; or does not himself offer to pay anything, the jury may conclude that the demand and refusal is sufficient. *Ib.*

5. An offer to return property at a distance from where it was taken will not bar an action for the conversion. *Ib.*

DEMURRER.

1. Where an action of trespass was brought in the name of "The State of Iowa, who sues for the use and benefit of the Des Moines navigation and railroad company," and the petition alleged that the trespass was committed on certain lands "belonging to, and being the property in fee simple of, the said state of Iowa;" and where the petition was demurred to, on the ground that it appeared from the petition, that the plaintiff had no interest in the subject matter of the suit, and that the real party in interest should sue for a trespass, and not another for his use, which demurrer was overruled; *Held*, That the words "for the use and benefit of the Des Moines navigation and railroad company," were mere surplusage, and that the demurrer was properly overruled. *The State v. Butterworth*, 158.

DISCOVERY.

1. Sections 1744, 1745, and 1746 of the Code, were not designed to enable a party in an action at law, to obtain a discovery of any and all matters of defence, whether of an equitable or legal character, which he might see proper to set up or plead. *McConnoughey v. Weider*, 408.

2. Whatever might be tried at law, the defendant may make an issue upon, and require a disclosure under oath from his adversary; but he cannot in this method, engraft upon an answer in an action at law, matters that are alone cognizable on the equity side of the court. *Ib.*

DOWER.

1. Where there is no express declaration in a will, barring the wife of dower, the intention to so bar her, must be deduced by clear and manifest implication from the instrument, founded on the fact that the claim of dower would be inconsistent with the will, or so repugnant to its dispositions, as to disturb and defeat them. *Corriell v. Ham*, 552.

2. The claim for dower, to be inconsistent with the will, must defeat, or interrupt, or disappoint some of its provisions. *Ib.*

3. Where a husband devised to his wife, during her natural life, and so long as she remained unmarried, &c., all his real and personal property; and where the wife, subsequently to the death of her husband, claimed her dower in certain real estate of her husband, sold on execution against him, previous to his death, to which she had not released her dower; *Held*, 1. That the claim for dower, so far from disappointing or interfering with the will, harmonized with it, and went to the same end. 2. That even if the wife had claimed the property under the will, she could not be bound by its provisions, if there was no title in her husband. 3. That if the title in the husband failed, the wife was remitted to her right of dower. *Ib.*

4. Section 1407 of the Code, has no application to such a case. *Ib.*

DRUNKENNESS.

1. In law, the acts of the drunkard are avoided on the ground of incompetency; in equity, on that of fraud. *Mangfield v. Watson*, 111.

2. As mere moderate drunkenness does not deprive the mind of the power of rational consent, and is not always apparent to others; it does not, of itself, avoid a contract. *Id.*

3. In order to avoid a deed or contract, there must be that state of excessive drunkenness which deprives the person of the consciousness of what he is doing; and this excessive drunkenness is a defence, whether voluntary, or caused by the fraud or procurement of the other party to the contract. *Id.*

4. But there may be such contrivance or management on the part of one party, to draw the other into drink, and thus to take advantage of his intoxication, as would justify the interposition of a court of equity, on the ground of fraud, even where the drunkenness is less than excessive. *Id.*

5. In either case, such intoxication only renders the contract voidable, and not void; and the party, on recovering his understanding, may adopt the same. *Id.*

ELECTION.

1. The August election is established by law, and the time it is held, should be judicially taken notice of. *Davis, Proc. Att'y. v. Best*, 96.

EQUITY.

1. On an appeal in chancery, the facts, as well as the law of the case, are reviewed and re-adjudicated by the Supreme Court; and upon an examination of the whole case, this court will render such a decree as should have been entered in the first instance, consistent with the case made by the bill, and sustained by the proof. *Pierce v. Wilson et al.*, 20.

2. In order to authorize a court of equity to treat an absolute deed as a mortgage, it is necessary to show a debt existing between the parties at the time of the transaction, and that the title to the land passed from one to the other. *Usher v. Livermore*, 117.

3. Where, in a suit in equity to obtain title to certain real estate, the bill alleged that the complainant purchased a claim on the land in 1840, and continued in possession until about 1850, most of the time by himself or his tenants; that in 1846, being unable to enter the land, he caused the respondent to enter it; that this was done in order to get farther time to pay for the land; that to effect their object, the parties entered into an agreement or lease, on the 10th of October, 1846, by which the respondent leased the land to the complainant for the term of three months, and the latter agreed to pay all taxes, and a rent of ten dollars at the expiration of the term, and to yield possession, and which lease further provided, as follows: "And the said Livermore agrees, that if the said Usher shall pay the further sum of \$100, in land office money, then he will make the said Usher a quit claim of said land and warrant against his own acts; all said money to be paid at the expiration of this lease. And it is expressly understood, that if either party shall not keep all the covenants aforesaid, then the above is to be forfeited;" and that the transaction was a loan of money by the complainant from the respondent, and it was agreed that the latter should enter the land and take the title in his own name, for the purpose of securing the repayment of the money; and where the answer denied that the transaction was a loan to enable the complainant to enter the land, and insisted upon the terms of the contract; *Held*, that time was of the essence of this contract; and that to give the contract any vitality, after the time prescribed, at least, if not before, there should be a power of enforcing it against the complainant as well as the respondent. *Id.*

4. In contracts respecting real property, courts of equity are in the habit of interposing to grant relief to a far greater extent, than in cases respecting personal property; and while, in cases respecting chattels, this jurisdiction is limited to special circumstances, in case of land contracts it is universally maintained. *Young v. Daniels*, 126.

5. Courts of equity will decree parties to perform that, which in legal contemplation, they are able to perform, and not that which, it is manifest, they have no legal power to carry out; and if the decree is to be void and imperfect, and cannot be performed, a specific performance ought not to be decreed. *Ferrier v. Busick*, 136.

6. Where it has become impossible for a party to perform his part of the contract, a court of equity will not decree such performance, but will either leave the party to his legal remedy, or retain the bill, for the purpose of awarding compensation to the injured party. *Id.*

7. Sections 1744, 1745, and 1746 of the Code, were not designed to enable a party in an action at law, to obtain a discovery of any and all matters of defence, whether of an equitable or legal character, which he might see proper to set up or plead. *McConnoughey v. Weider*, 408.

8. Whatever might be tried at law, the defendant may make an issue upon, and require a disclosure under oath from his adversary; but he cannot in this method, engraft upon an answer in an action at law, matters that are alone cognizable on the equity side of the court. *Id.*

9. Where the parties have, without objection, submitted issues of fact to a jury, and appear to have had a full investigation, and introduced their whole testimony on such issues, which, by the submission, they virtually concede raise the real questions in the case, every doubt in the mind of the chancellor, on such issues of fact, should be solved in favor of the finding of the jury. *McDaniel et al. v. Marygold et al.*, 500.

ERROR.

1. The giving or refusing an instruction upon a mere abstract proposition of law, which does not refer in any way to the evidence of the case, or issues made, is not such an error as will warrant a reversal of the judgment, unless it may be fairly inferred that the jury was thereby misled, to the prejudice of the party complaining. *McGregor, Laves & Blackmore v. Armitt*, 30.

2. An assignment of error as follows: "In overruling various other motions and questions apparent upon the record, which is made part and parcel of this assignment of error," is too broad and indefinite to be considered by the Supreme Court. *Santo et al. v. The State*, 165.

3. The Supreme Court will regard no assignment of error, based upon the giving or refusing any instruction in the court below, unless it appears that exception was taken at the time, and the instruction embodied in a bill of exceptions, and made part of the record. *Ewing v. Scott et al.*, 447.

ESSENCE OF CONTRACT.

1. In an agreement for the sale of land, which provides as follows: "But should the taxes, and the note above described, not be paid by the time they become due, then I reserve the right to sell the above-described land at any time thereafter, to any person or persons," time is of the essence of the contract. *Tomlinson v. Smith et al.*, 39.

2. Where, in a suit in equity to obtain title to certain real estate, the bill alleged that the complainant purchased a claim on the land in 1840, and continued in possession until about 1850, most of the time, by himself or his tenants; that in 1846, being unable to enter the land, he caused the respondent to enter it; that this was done in order to get farther time to pay for the land; that to effect their object, the parties entered into an agreement or lease, on

the 10th of October, 1846, by which the respondent leased the land to the complainant for the term of three months, and the latter agreed to pay all taxes, and a rent of ten dollars at the expiration of the term, and to yield possession, and which lease further provided, as follows: "And the said Liv-
 armore agrees, that if the said Usher shall pay the further sum of \$100, in land office money, then he will make the said Usher a quit claim of said land and warrant against his own acts; all said money to be paid at the expiration of this lease. And it is expressly understood, that if either party shall not keep all the covenants aforesaid, then the above is to be forfeited;" and that the transaction was a loan of money by the complainant from the respondent, and it was agreed that the latter should enter the land and take the title in his own name, for the purpose of securing the repayment of the money; and where the answer denied that the transaction was a loan to enable the complainant to enter the land, and insisted upon the terms of the contract; *Held*, that time was of the essence of this contract; and that to give the contract any vitality, after the time prescribed, at least, if not before, there should be a power of enforcing it against the complainant as well as the respondent. *Usher v. Liv-
 armore*, 117.

3. In contracts relating to real estate, time may be of the essence of the contract. *Young v. Daniels*, 126.

4. But in equity, time is not deemed of the essence of the contract, unless the parties have so treated it, or it necessarily follows from the nature and circumstances of the contract. *Id.*

5. Where a contract for the conveyance of real estate contained the following provision: "And it is expressly agreed by and between said parties, that in the event of the non-payment of said sum of money, or any part thereof, at the time herein limited, that then the said D. may elect to consider the contract at an end, and the said Y. shall be considered the tenant of D., holding over the termination of his lease;" *Held*, 1. That time had not been made of the essence of the contract, by the express stipulation of the parties. 2. That this provision cannot, of itself, be construed as making time material, without some evidence that the vendor elected so to treat it. *Id.*

6. Where the condition in a bond for the conveyance of real estate, read as follows: "Whereas the above-named B. pays to the above M., two promissory notes—one fifty dollar note, payable on demand, at ten per cent. interest; the other payable in one year from date, two hundred dollars, at the rate of ten per cent. Whereas, if B. pays the above sum to the above M., at the expiration of the year, then the above-named M. does deliver unto the above-named B., at the expiration of the year, August 8th, 1854, a deed, with general warranty [here follows a description of the land]; then this obligation to be null and void—otherwise to remain in full force and virtue in law;" *Held*, That time was not of the essence of the contract. *Brink v. Morton et al.*, 411.

EVIDENCE.

1. A party objecting to the admission of evidence, should show by his exceptions, the ground of objection to the evidence admitted. *Thompson v. Blanchard*, 44.

2. The appellate court cannot pass upon any objections to evidence, not insisted upon at the trial below. *Id.*

3. Where in an action on an award in relation to certain services rendered by plaintiff in and about a steam mill, as well as the private accounts of the parties, which was resisted on the ground of errors and mistakes, the defendant introduced one of the arbitrators, and proposed to prove that at the time of the hearing before the arbitrators, there was no testimony introduced to show what were the net profits of the mill; and also, that at the same hearing, the plaintiff produced a certain book, in which he had kept his account of sales of lumber at said mill, which book was handed to one of the arbitrators, but that it was not examined by them after they had retired to make up their award,

which testimony was rejected by the court; *Held*, That the evidence was admissible. *Ib.*

4. In relation to officers, civil and criminal, when the question arises between third parties, parol evidence is admissible to show that they were officers at a given time, and perhaps, to show that they acted as such. *Gowley v. Hankins*, 75.

5. As between third persons, when the question is, whether a person doing an act was an officer, it is sufficient to show him to be such *de facto*: and it is not required of the party claiming or justifying under the act of the officer, to prove that he was such, by the highest and best evidence. *Ib.*

6. The highest and best evidence is required only, when the officer himself is a party, and he justifies or claims by virtue of his office. *Ib.*

7. And where in an action of right, the defendant, to prove title in himself to the premises, offered in evidence a deed, purporting to have been executed by the county of Johnson, concluded and signed as follows: "In testimony whereof, I, Stephen B. Gardner, agent of the county of Johnson, in the state of Iowa, have herunto set my name, this 9th day of February, A. D. 1848. Stephen B. Gardner, agent of J. C.," and offered to prove by parol testimony, that said Gardner, at the time of the execution of said deed, was clerk of the board of county commissioners of Johnson county, which testimony was rejected, and the court refused to admit the deed in evidence; *Held*, 1. That the oral testimony offered, as well as the deed, were improperly rejected. 2. That the parol testimony offered, did not tend to change or alter the deed. *Ib.*

8. Section 2394 of the Code, which provides that the prohibitions in the previous sections, are not to apply to cases where the party in whose favor the respective provisions are enacted, waives the right thereby conferred, refers to the persons named in sections 2391, 2392, and 2393, as husband and wife, attorneys, physicians, ministers, and the like; and cannot refer to a class of cases, where the exclusion of the testimony is for the benefit and protection of neither party exclusively, but for all parties, where either is a white person. *Mottis v. Usher & Thayer*, 82.

9. Parol evidence will not be received to vary or contradict that which is evidenced by writing, and this doctrine applies in equity, as well as at law. *Sullivan v. McLennan*, 437.

10. Where, in an action by the assignee, against the makers and one of the indorsers of a promissory note, which note was secured by a trust deed on real estate, S., one of the makers, answered, admitting the execution of the note and deed of trust, and the assignment of the note, by G. to C.; averring that he knew nothing of the assignment by C. to plaintiff; that he understood the note was pledged by C. to plaintiff, as security for \$50 loaned, which he claimed had been paid; that the note had been fully paid, and the deed of trust canceled; and denying that the note is the property of the plaintiff; and where G., the indorser of the note, answered, admitting the assignment of the note to plaintiff; denying that the note or deed of trust is the property of plaintiff, and that any amount is due thereon; and averring that the note and deed were by him placed in plaintiff's possession, as a pledge or security for money borrowed, and that he did not thereby intend to transfer any right of action or general property to the plaintiff, but only a special property, until the money borrowed should be paid, and that the money loaned by plaintiff, had been paid or tendered to him by defendant; and where the replication of the plaintiff to these answers, denied the new matter set up, and averred that it was expressly agreed, that plaintiff was to collect the note of S., and pay himself the money loaned, with interest, and pay the remainder to C., and that C., with a view to defraud plaintiff, unlawfully entered upon the records, a cancellation of the deed of trust, and that the same was void, which replication was not denied; and where on the trial of the cause, the defendants offered to prove the value of the property pledged to the plaintiff, proposing to follow it up with proof,

that plaintiff had converted the pledge to his own use; that the property pledged was worth five or six times the amount of the sum for which the same was pledged; and that said property was pledged to secure the same debt for which this suit was brought, which evidence was sought to be introduced, after the defendants had given evidence of the sale of the trust property by the trustee, and a deed made to the purchaser, and which evidence was rejected by the court; *Held*, That the court did not err in refusing to admit the evidence. *Ewing v. Scott et al.*, 447.

11. It is the duty of a court to determine, and so inform a jury, whether a writing introduced in evidence, is, or is not, a contract, or that which fixes the liability of the parties in the premises. *Eyaer v. Weisgerber*, 463.

12. Where in an action for libel, the defendants, after proving by a witness that the general character of the plaintiff was bad, and that he was reputed to be a "slanderer," proposed to prove that the plaintiff had been "guilty of speaking slanderous words of others," which evidence was rejected; *Held*, That the evidence was clearly inadmissible. *Forbes v. Abrams et al.*, 571.

13. And where in such an action, the defendants proved by one F., that the plaintiff's general character, in the neighborhood where he resided, was bad; and then offered to prove by the same witness, that the plaintiff was generally reputed a malicious man, which evidence was excluded; *Held*, That the evidence in no manner tended to establish the fact that the libel was not published, nor to show that the plaintiff's damages should, for that reason, be less, and was properly excluded from the jury. *Id.*

14. And where in such an action, the defendants proved that a short time previous to the burning of the school-house, referred to in the libel, an attempt was made to burn the said house; that about the time of this attempt, a witness passed the house late at night, saw a great light therein, and heard persons talking inside, but who they were, the witness could not state; that one B. was a near neighbor of plaintiff, and intimate with him, and had enmity toward one of the defendants; that this B. had proposed to a witness to assist the plaintiff in a certain other lawsuit against said defendant; that B. and plaintiff had voted against having a school in this school-house; that plaintiff knew that A. would probably be employed as a teacher, and further, that said A. had been employed, and commenced teaching four days before the house was burned; that plaintiff had, for some years past, associated with B. and two other persons, and had but little communication with the defendants; and that on the next day after the burning, the plaintiff and B. were seen talking together in a hollow near the road, a short distance from the plaintiff's home; and thereupon the defendants offered to prove that B. had proposed to a witness to go to the house of A., and steal chickens, take them to the school-house, have a feast, and then burn up chickens and feathers, together with the house, which testimony was excluded from the jury; *Held*, That the evidence was properly rejected. *Id.*

15. The object of the law is to exclude improper evidence; and, as a general rule, this can be done with more certainty, when the objection is made to improper questions, and this shown by exceptions, taken at the time. *Cutler v. Fanning*, 580.

EXECUTOR AND ADMINISTRATOR.

1. T. in his lifetime, commenced suit for damages occasioned by his being overturned in a stage-coach of the defendants; after T.'s death, his wife was appointed administratrix of his estate, and substituted as a party to the suit. She filed an additional petition, claiming \$5,000 damages in her own right, in consequence of the death of her husband. A judgment of \$1,500 was rendered, and the cause appealed to the Supreme Court, where the judgment was reversed. The parties then made a settlement, the defendants paying the sum of \$400, and taking from her a release, which they filed in the cause. At a subsequent term of the District Court, the plaintiff moved the court to set

aside the settlement, because it was entered into without the approbation of the county court, and because it was procured by fraud and misrepresentation; and on the hearing of the motion, the court held the settlement void, and set the same aside. *Held*, 1. That the regular way for the defendants to have availed themselves of the settlement, was, to have answered over the accord and satisfaction, *puis darrien continuance*. 2. That the court could not properly set aside the settlement on motion. 3. That if the settlement was procured without fraud or collusion on the part of the defendants, upon being properly pleaded, it may be made a defence to the suit. 4. That sections 1336, 1359, 1361, and 1362, of the Code, did not prohibit the making of the settlement, without the approbation of the county court. *Taylor, Adm. v. Frink & Co.*, 84.

2. Sections 1336, 1359, 1361, and 1362, of the Code, do not in any manner affect the validity of contracts made with an executor or administrator, *bona fide*, in relation to the personal property, or *choses in action*, of the intestate. *Ib.*

FENCE.

1. Where no statutory regulation exists, defining the duties of railway companies as to fence, they are under no obligation to erect fences between their road and the adjoining land. *Henry v. The Dubuque and Pacific Railroad Co.*, 288.

2. Chapter fifty-two of the Code, regulating partition fences, is not applicable as between the owner in fee of land and a company having a right of way for a railroad over such land. *Ib.*

3. Where in an action against a railroad company for damages, in taking certain real estate for the construction of their road, the jury found for the plaintiff a certain sum for his damages, and a certain other sum for building a fence and keeping the same in repair, for the aggregate of which sums, judgment was rendered against the company; and where it was not specifically shown in the special verdict, that plaintiff was allowed for building a fence, *as fence*, and thereupon it was urged that the case did not come within the rule laid down in *Henry v. The Dubuque and Pacific Railroad Co.*, *ante*, 288; *Held*, That there was no substantial difference between the two cases, and that the judgment must be reversed. *Kennedy v. The Dubuque and Pacific Railroad Co.*, 521.

FERRY.

1. The state of Iowa could not grant a ferry right, which would operate, or confer any rights, on the territory of the state of Wisconsin. *Weld v. Chapman*, 524.

2. Still less does such a grant, authorize the grantee to transport passengers from the Wisconsin to the Iowa side of the Mississippi river. *Ib.*

3. So, a similar grant by Wisconsin, gives no authority on the Iowa shore, and confers no right to transport from the Iowa side. *Ib.*

4. Section twelve of the act entitled "An act to regulate ferries," approved February 16, 1843, which provides, that no license shall be granted to keep a ferry on said Mississippi river, within two miles of any other licensed or chartered ferry, applies only to licenses and charters granted under the authority of this state. *Ib.*

5. Such restrictions in the statutes of a state, have reference to its own acts, and not those of other states, unless the language be express, or the construction essentially necessary. *Ib.*

6. Any person has a right to transport himself and property over a river, in his own boat, although there may be a ferry at the place where he crosses; but if he makes this right a cover for carrying travelers, it then becomes an infringement of the ferry right. *Ib.*

7. The transportation of passengers in a mail coach, is not embraced in a contract for carrying the mail, but is an independent matter of private speculation and benefit. *Ib.*

FOREIGN JUDGMENT.

1. In an action upon a judgment recovered in another state, the defendant cannot plead any defence which he might have made in the former suit. *Johnson & Stevens v. Butler*, 535.

2. In such an action, the plaintiff can, by *pleading*, be compelled to show enough of the record, to prove a valid judgment recovered; but he cannot, by motion, be obliged to produce any particular part of the record. *Ib.*

3. And where, in such an action, the defendant filed a motion, that the plaintiff be ruled to complete the record, by filing a certain paper described in the motion, which motion was sustained; and where, the paper not being produced, the court rendered judgment of nonsuit against the plaintiff; *Held*, That the court erred in sustaining the motion, and dismissing the suit. *Ib.*

FRAUD.

1. Fraud must be proved, and will not be presumed. *Mansfield v. Watson*, 111.

2. Fraud is of various kinds, but generally consists either in the misrepresentation or concealment of a material fact. *Ib.*

3. The party alleging fraud, should also make it appear that he relied or acted upon the representation made, and that he was vigilant, and not careless, in making the contract. *Ib.*

4. In law, the acts of the drunkard are avoided on the ground of incompetency; in equity, on that of fraud. *Ib.*

5. In order to avoid a deed or contract, there must be that state of excessive drunkenness which deprives the person of the consciousness of what he is doing; and this excessive drunkenness is a defence, whether voluntary, or caused by the fraud or procurement of the other party to the contract. *Ib.*

6. But there may be such contrivance or management on the part of one party, to draw the other into drink, and thus to take advantage of his intoxication, as would justify the interposition of a court of equity, on the ground of fraud, even where the drunkenness is less than excessive. *Ib.*

7. Although a defendant may answer, setting up fraud generally, yet if he alleges a particular state of fraud only, he will be confined in his evidence, to proof of the fraud alleged; and the issue submitted to the jury, must not enlarge the pleadings. *Brink v. Morton et al.*, 411.

GARNISHEE.

1. Where a garnishee answered as follows: "At the time of the service of the garnishee notice in this action, I had under my control property of the defendants to the amount of probably \$2,000—it may have been more or less. This property had been previously attached at the suit of Lawrence, Stewart & Co., against Robbins & Co., and released by a bond on which I was surety. To secure me against my liability on said bond, Robbins & Co. executed to me a chattel mortgage on said property, with power at any time to take said property into my possession. Previous to my being garnished in this suit, I had taken possession of the said property, and was selling the same under a subsequent agreement between said Robbins & Co. and myself. Since the time of my garnishment in this action, the said property was attached by Harvey Leonard, sheriff of Scott county, and taken from my possession. The

above-mentioned suit of Lawrence, Stewart & Co., against Robbins & Co., in which said property was attached, was brought for about \$1,000 and costs; and judgment was rendered against said garnishee on said answer, for the amount of the plaintiff's claim against the original defendants; *Held*, That the District Court erred in charging the garnishee on his answer, at this stage of the proceeding. *Williams & Cunningham v. House, Garnishee*, 154.

2. The garnishee's liability is to be measured by his responsibility and relation to the defendant in the original suit, and he is to be charged only in consistency with, and subject to, his contract with such defendant. *Ib.*

3. If a garnishee is chargeable at all, and has sufficient means in his hands, it is not error to render judgment against him for the costs of the original suit, in which he is garnished. *Ib.*

4. Garnishees are presumed to be innocent persons, and indifferent between the parties; and it is for the plaintiff to show the garnishee's liability, either from his answer, or by forming an issue on the answer, and showing it by other proof. *Ib.*

GRAND JURY.

1. Whether the term of court is a special term, as provided for by section 1569 of the Code, or a continuance of the regular term (that having been adjourned over), it is competent for the grand jury, if impaneled, to inquire into offences. *Sharp v. The State*, 454.

GRANT AND GRANTEE.

1. By the common law, all grants between individuals must be made to a grantee in existence, or capable of taking, otherwise there could be no such thing as livery of seizin. *Miller v. Chittenden et al.*, 315.

2. But this rule does not apply to grants or devises to charitable or benevolent purposes, and especially where the legal estate is vested in trustees, to hold for the use of the contemplated charity. *Ib.*

3. In such cases, if the intent of the donor can be ascertained, and it be legal, courts of equity will carry it out. *Ib.*

4. The exercise of jurisdiction by courts of chancery in cases of grants or devises to charities, is not dependent upon the statute of 43 Elizabeth, commonly known as the statute of charitable uses. *Ib.*

5. Grants, devises, or dedications to public, pious, or religious uses, from the necessity of the case, form exceptions to the rule applicable to private grants, requiring a grantee as well as a grantor. *Ib.*

6. It is not necessary in such cases, that the beneficiary should, at the time of the grant, be clothed with the power or capacity of taking the benefit of the donor's bounty; but the intention of the donor will be executed, if this capacity arises within a reasonable time thereafter. *Ib.*

7. In the meantime, where the property is in the hands of a trustee, and the object and purpose of the grant look to a future grantee, it will be held in abeyance. *Ib.*

8. And it is not necessary that the trustee shall have the power to create the beneficiary, or proceed with the execution of the trust before such creation, in order to sustain and uphold such a grant or devise. *Ib.*

9. As between two grantees, purchasing different parcels of incumbered premises, at different times, there is no more moral obligation on the one to pay, than the other; and in such cases, their interest is common—their rights are equal—and there should be equality of burden. *Bates v. Ruddick et al.*, 423.

10. The grant of a franchise by the state, cannot extend beyond her own limits. *Weld v. Chapman*, 524.

11. The state of Iowa could not grant a ferry right, which would operate, or confer any rights, on the territory of the state of Wisconsin. *Ib.*
12. Still less does such a grant authorize the grantee to transport passengers from the Wisconsin to the Iowa side of the Mississippi river. *Ib.*
13. So, a similar grant by Wisconsin, gives no authority on the Iowa shore, and confers no right to transport from the Iowa side. *Ib.*
14. Section twelve of the act entitled "An act to regulate ferries," approved February 16, 1843, which provides, that no license shall be granted to keep a ferry on said Mississippi river, within two miles of any other licensed or chartered ferry, applies only to licenses and charters granted under the authority of this state. *Ib.*
15. Such restrictions in the statutes of a state, have reference to its own acts, and not those of other states, unless the language be express, or the construction essentially necessary. *Ib.*

INDORSER AND INDORSEE.

1. Where suit was brought against the maker and indorser of a note, which read as follows: "Oct. 28, 1854. Ten days after date, I promise to pay David H. Means, one hundred dollars, the balance due on house and lot, No. 2, B. 19, when said wood-work on said house is finished, for value received. Thomas M. Sloan;" indorsed as follows: "For value received, I assign the within to Samuel Hickman, Nov. 14, 1854. D. H. Means;" and where the maker of the note answered, that the note was given as the balance due on the house and lot, and the wood-work thereon, by the payee; that the work had not been completed according to the contract; and that the consideration had therefore failed, which answer was not replied to by the plaintiff; and where the indorser made no defence to the action, but replied to the answer of his co-defendant, alleging that he had performed all the work required of him by his contract with the maker, and that the consideration had not failed; and where on the trial, the indorser was offered as a witness by the plaintiff, to show the complete performance of the work mentioned in the note, to which defendant objected, because of the interest of the witness, which objection was overruled, and the witness permitted to testify; *Held*, That under the issue made, the indorser was not a competent witness for the plaintiff against the maker of the note. *Hickman v. Sloan*, 64.

INFORMATION.

1. Where in a proceeding by *quo warranto*, the information commenced as follows: "Your informant, Wm. P. Davis, Prosecuting Attorney of the county of Lucas;" *Held*, That the information was properly styled, under section 2152 of the Code, which provides that such information may be filed by the *district attorney* of the proper county. *Davis, Pros. Atty. v. Best*, 96.
2. An information filed by the proper prosecuting attorney, in his official character, requires no other verification than his official signature. *Ib.*

INJUNCTION.

1. An injunction should not issue in an ordinary case of trespass. *Cowles et al. v. Shaw et al.*, 496.
2. Where the defendants in an action of trespass, which is being continued, are entirely insolvent; or where the trespass has or may become a nuisance, or amounts to waste; or where numberless suits may have to be brought to make the remedy complete; or where the trespass is by a party occupying a fiduciary relation; or where the injury is of such a character that the loss

would be irreparable, and not to be compensated by damages, an injunction to restrain the commission of the trespass, may properly issue. *Id.*

3. Where in an action of trespass for cutting timber, the petition averred that the defendants were continuing the trespass, with a view of carrying the timber away, and further alleged as follows: "Your petitioners believe and further represent, that the said defendants intend and assert, and if not restrained will take and carry away said cord wood (the timber so as aforesaid cut down), from said premises, and so dispose of the same, as to put it beyond the reach of your petitioners. Your petitioners further represent, that if the defendants are notified of this application, they will remove said cord wood, before an injunction can be served upon them. For all which said trespasses, the said plaintiffs ask judgment in treble damages, and pray that an injunction may be allowed to restrain said defendants from committing any further trespass on said land, and from moving said cord wood therefrom," upon which petition an injunction issued; and where the defendants moved to dissolve the injunction, and at a subsequent term, under a rule to answer within a given day, demurred to the said petition, because the plaintiffs had an adequate remedy at law, which motion and demurrer were overruled; and where, the defendants refusing to answer further, the bill was taken as confessed, and the injunction was thereupon made perpetual; *Held*, That both the motion and demurrer should have been sustained. *Id.*

INSTRUCTION.

1. The giving or refusing an instruction upon a mere abstract proposition of law, which does not refer in any way to the evidence of the case, or issues made, is not such an error as will warrant a reversal of the judgment, unless it may be fairly inferred that the jury was thereby misled, to the prejudice of the party complaining. *McGregor, Laws & Blackmore v. Armitt*, 30.

2. Where in an action on a note, the signature to which was denied under oath, upon which issue was taken, the defendant, to sustain the issue upon his part, produced four witnesses, who testified that they had seen him write recently within a year or two, and they were of opinion that the signature to the note was not the handwriting of the defendant, three of which witnesses were experts; and the genuine handwriting of the defendant being shown them, they gave their opinion as experts, from their knowledge of his handwriting; and where, there being no evidence of any witness that had seen the defendant sign the note, the court instructed the jury, that "the evidence of experts, who are not acquainted with the signature or handwriting of the person whose signature is in dispute, is the lowest and least satisfactory kind of evidence as to the genuineness of handwriting:" *Held*, That there was no evidence to justify the court in giving the instruction, and that it was fairly inferable that the instruction misled the jury, under the circumstances disclosed, to the prejudice of the defendant. *Id.*

3. Where an action was brought on an award, on which there was a credit of \$283.20, and the plaintiff in his petition stated, that \$67 of the credit so indorsed, was a mistake; that upon the agreement of defendant, that plaintiff should have a certain lot of lumber to that amount, he consented to give him the credit, but that defendant had refused to let him have the lumber—had appropriated the same to his own use—and that the credit was, therefore, to that amount incorrect, which averments were not denied by the answer; and where the court instructed the jury, "that they were not bound to take into consideration any credit indorsed on the award, if the defendant has failed to prove the same;" *Held*, That the averments in the petition in relation to the mistake in the credit, not being denied, were to be taken as admitted, and with reference thereto, the instruction was not erroneous; and that as to the balance of the credit, the instruction was erroneous, but that, as it appeared from the record, that the jury allowed the balance of the credit in making up

their verdict, no prejudice had resulted to the defendant. *Thompson v. Blanchard*, 44.

4. The Supreme Court will not reverse a cause, where an erroneous instruction, has been given, if it appears that the party complaining suffered no injury therefrom. *Ib.*

5. To make the instructions of the court a part of the record, they must be embodied in a bill of exceptions. Otherwise, they will not be so regarded, though they may be in writing, and copied into the transcript by the clerk, *Ewing v. Scott et al.*, 447.

6. Where it is evident that foreign or inapplicable instructions could reasonably have misled the jury, to the appellant's prejudice, the appellate court will reverse the case, and order a new trial; but not so, where the prejudice is not manifest. *Eyser v. Weissgerber*, 463.

7. Where the instructions are so confused, that it is evident that the jury was misled, and acted at random, to the probable prejudice of the appellant, a new trial will be ordered. *Ib.*

8. But where the instructions in chief, and those asked by, and given for, the appellant, are conflicting merely, and the latter are incorrect, such conflict will not be a sufficient cause for reversal. *Ib.*

9. While by our practice, the appellate court will not inquire into the correctness of instructions given or refused, unless the party objecting has the same incorporated in a bill of exceptions; yet it is not necessary that he should except separately to each proposition contained in the instructions. A general exception to the entire instructions will, ordinarily, be sufficient. *Ib.*

10. But the judge below, or the opposite party, may, in such cases, require the party excepting, to point out the specific portion or portions of the instructions to which he objects, so as to call the attention of the court to the objectionable matter. *Ib.*

11. Where the exception is to the whole charge, and greater particularity does not appear to have been required in the court below, errors may be assigned so as to obtain a review of any part of such instructions. *Ib.*

12. Where in an action for libel, the defendants asked the court to instruct the jury as follows: "That they need not be satisfied, beyond a reasonable doubt, as to the matters of their defence, but it is only necessary that they should be satisfied from the evidence, and all the circumstances of the case before them, of the matters alleged in defence," which instruction the court refused to give; *Held*, That the instruction was properly refused. *Forshoe v. Abrams et al.*, 571.

13. The word *direction*, in section 2772 of the Code, means instruction. *Ib.*

14. Instructions not excepted to in the court below and embodied in a bill of exceptions, cannot be reviewed by the appellate court. *Cutler v. Fanning*, 580.

15. Where the errors assigned have no reference to the instructions, the appellate court will not notice the instructions. *Ib.*

16. An instruction, abstractly correct, if not applicable to the case, may properly be refused. *Ib.*

17. To show the applicability of an instruction which has been refused, the appellant should bring up, in a proper manner, the testimony on which he relies to show its applicability. *Ib.*

18. Where instructions are asked, which are given with qualifications by the court, the party asking the instructions, must object to their qualification, and deny the right of the judge thus to qualify them, at the time, or else he cannot deny such right in the appellate court. *Ib.*

INTEREST.

1. A promise to pay more than ten per cent. interest, under the statute of 1843, is without consideration, and void. *Sullivan v. McLennans*, 437.
2. Section 2390 of the Code, which provides, that a person who has a direct certain, and legal interest in the suit, is not a competent witness, unless called on by the opposite party, is but declaratory of the rule stated conversely in the books, that a person is competent, unless he has such an interest. *Cutler v. Fanning*, 580.
3. The *true test of interest* is, that the witness will either lose or gain by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him, in some other action. *Ib.*
4. If the interest is of a doubtful nature, the objection goes to the credit of the witness, and not to his competency. *Ib.*

IOWA CITY.

1. Section thirteen of the act entitled "An act to incorporate Iowa City," approved January 24, 1853, which provides that appeals to the District Court in the same county, shall be allowed from the judgments and decisions of the mayor, in the same cases, time and manner, as may at any time be allowed by law from those of other justices, and they shall be tried as in other cases, is not restrictive, but confers a general right of appeal. *Conboy v. Iowa City*, 90.
2. Appeals from the judgments of the mayor of Iowa City, may be taken by any person aggrieved; but, in similar cases, they must be taken in the same time, and in the same manner, as appeals are taken from a justice of the peace. *Ib.*
3. Section twelve of the same act, which confers on the mayor of Iowa City, exclusive *original* jurisdiction for the violation of the ordinances of the city, implies that the officer is not to have *exclusive* jurisdiction or final jurisdiction, but that a review of his proceedings by the District Court is contemplated. *Ib.*
4. The mayor of Iowa City is authorized to take judicial notice, *ex officio*, of the city ordinances. *Ib.*
5. Under section nineteen of the charter of Iowa City (Laws of 1853, 99), which provides that the city ordinances shall also be recorded in a book to be kept for that purpose, and signed by the mayor, and attested by the recorder, the signature of the mayor to the copy of record, is not essential to the taking effect of an ordinance. *Ib.*
6. So much of section nineteen as requires the city ordinances to be signed by the mayor, attested by the recorder, and before they take effect, to be published in one or more newspapers published in the city, at least ten days; and if there be no such paper, they shall be posted up in each ward the same length of time, are essential to the ordinances taking effect; but those requirements following these provisions, relate to the preservation of the ordinances, and are simply directory. *Ib.*

JUDGMENT.

1. Under the act entitled, "An act to prevent frauds," approved January 16, 1840 (Rev. Stat. 1843, 271), a judgment was a lien on an equitable interest in real estate. *Blain v. Stewart*, 378.
2. A verdict or judgment which settles and determines that a party to a suit has not an interest in the property in controversy, is ordinarily sufficient, so far as the rights of that party is concerned, without proceeding to determine who, in fact, has such right. *McDaniel et al. v. Marygold et al.*, 500.

JURISDICTION.

1. In suits before justices of the peace, the amount claimed is the criterion

of jurisdiction, and not the amount that may appear to be due or owing on the instrument declared upon. *Stone v. Murphy*, 35.

2. Section twelve of the act, which confers on the mayor of Iowa City, exclusive *original* jurisdiction for the violation of the ordinances of the city, implies that that officer is not to have *exclusive* jurisdiction or final jurisdiction, but that a review of his proceedings by the District Court is contemplated. *Conboy v. Iowa City*, 90.

3. In order to give this court jurisdiction over an appellee, he must be served with notice in some manner, and this service is as essential to give jurisdiction, where there is no voluntary appearance, as it is in the District Court. *McClellan v. McClellan*, 302.

4. In this country, the jurisdiction of courts of equity over charities, must be exercised judicially, and not as a prerogative power. *Miller v. Chittenden et al.*, 315.

JURORS.

1. Section 1810 of the Code, which provides, that in applications for new trials, the affidavits of jurors may be taken and used in relation to such applications, was not designed to compel jurors, by rule, to answer under oath as to how, or in what manner, they made up their verdict. *Forshee v. Abrams et al.*, 511.

2. Where after verdict for the plaintiff, in an action for libel, the attorney for the defendant filed his professional statement, alleging that the jurors agreed to make up their verdict by marking each a certain sum, and dividing the aggregate by twelve, and that some of the jurors admitted these things, but refused to give a statement or affidavit as to the manner in which they made up their verdict, upon which statement the attorney moved for a rule on said jurors, to answer as to the truth of said matters, which motion was overruled; *Held*, That the motion was properly overruled. *Ib.*

JURY.

1. The chancellor may decide questions of fact himself, and refuse an issue to a jury, or he may, in the exercise of a sound discretion, direct such an issue; and in either event, the appellate court will not disturb such order, unless it appears that such discretion has been abused, and exercised in a manner unwarranted by all the circumstances. *McDaniel et al. v. Marygold et al.*, 500.

2. Where the parties have, without objection, submitted issues of fact to a jury, and appear to have had a full investigation, and introduced their whole testimony on such issues, which, by the submission, they virtually concede raise the real questions in the case, every doubt in the mind of the chancellor, on such issues of fact, should be solved in favor of the finding of the jury. *Ib.*

3. Unless the finding of the jury is unconscionable, it should be allowed to stand. *Ib.*

4. By the same rule, will this court be governed, in the exercise of its appellate power, in determining like cases. *Ib.*

JUSTICE OF THE PEACE.

1. In suits before justices of the peace, the amount claimed is the criterion of jurisdiction, and not the amount that may appear to be due or owing on the instrument declared upon. *Stone v. Murphy*, 35.

2. The pleadings before a justice of the peace, may be written or oral; and when oral, they must, in substance, be entered by the justice on his docket.

But, in no case, is it necessary that the justice should set the same out with the particularity required in a formal petition. He is to give the substance of what the plaintiff claims, and more than this is not required. *Ib.*

3. In an action on a penal bond, before a justice of the peace, no petition is necessary; nor is it necessary that the docket entry of the justice, should show and specify the breaches of the bond, of which the plaintiff complains. *Ib.*

4. Where an original notice informed the defendants, that the plaintiff claimed "one hundred dollars, as justly due him on attorney's lien, secured by bond, made by you (defendants), December 30th, 1854, and filed in the district clerk's office of" &c., which statement was substantially entered by the justice on his docket: *Held*, That a statement of the plaintiff's cause of action was sufficiently stated on the docket of the justice. *Ib.*

5. Where in an action on a penal bond to secure the payment of attorney fees, the plaintiff, at the time of commencing his suit, deposited the bond, together with a bill of items of the services rendered, with the justice, which bond the justice failed to mark filed; and where on the day set for the trial, one of the defendants appeared, and moved to dismiss that cause, because the plaintiff's bill of items did not charge any indebtedness against him, and the plaintiff thereupon withdrew his bill of items, and made affidavit that he supposed that said bond had been filed, and was in the hands of the justice, until at the time set for trial, he was informed by the justice, that he had not filed the same; and asked leave to proceed on the oral pleadings, which leave was granted, and thereupon the defendant withdrew, and made no further defence; *Held*, 1. That the failure of the justice to mark the bond filed, could not prejudice the rights of the plaintiff; and that if such previous filing had been overlooked, and it became necessary to indorse the bond as filed, it was not only the right, but the duty of the justice, to make such indorsement *pro tunc*. 2. That the plaintiff did right in filing his account with the bond, and if the justice, by his ruling, on the defendant's motion, committed an error against the plaintiff, the defendant cannot complain. *Ib.*

6. The averments in the affidavit for a writ of error to remove proceedings from before a justice of the peace, amount to nothing, unless there is a response to the same in the return of the justice. *Ib.*

7. Where in a criminal proceeding before a justice, the justice entered on his docket the failure of the defendant to appear; *Held*, That in an action on the recognizance against the bail, the docket of the justice, or a transcript therefrom, must be taken as verity, and cannot be contradicted, by showing that the defendant did appear. *The State v. Gorley & Cloud*, 52.

8. Where, in an action on a recognizance against the bail, a transcript from a justice of the peace was offered in evidence, which contained an entry as follows: "February 6th, 1854, the day and time set for examination, the defendant, John R. Gorley, did not appear; it was therefore considered, that the bond was forfeited by said Gorley, and D. C. Cloud, security for said Gorley, stands bound to the state of Iowa, on said bond. Thomas Carroll, Justice of the Peace;" *Held*, That the justice's docket did not show such a default on the part of Gorley, as fixed the defendant's liability on the recognizance. *Ib.*

JUSTIFICATION.

1. In order to justify an assault by the father, in the defence of his son, or the protection of his own property, it is not necessary that such son shall be in real danger of great bodily harm, or that such property be in actual danger of material injury; but if the danger is such as to induce a person, exercising a reasonable and proper judgment, to interfere, in order to prevent the consummation of the injury, it is sufficient. *Hill v. Rogers*, 67.

KEOKUK.

1. The act to incorporate the city of Keokuk, approved December 13, 1848,

and the act amendatory thereof, approved January 22, 1853, confer upon the mayor of the city of Keokuk, the jurisdiction of a justice of the peace, under the criminal laws of the state; and the power thus conferred, is not in conflict with the third article of the constitution, which provides that no person charged with the exercise of powers properly belonging to one department of the government, shall exercise any functions appertaining to either of the others. *Santo et al. v. The State*, 165.

2. The seal of the city of Keokuk is a corporate seal, and not the seal of the mayor, when he acts as a justice of the peace under the laws of the state. *Ib.*

LAND.

1. Land, once sold or appropriated by the government, even though not patented, cannot be sold again. *Arnold v. Grimes and Chapman*, 1.

2. As between conflicting entries, the doctrine of notice is utterly discarded. *Ib.*

LAND OFFICES.

1. The register of a land office, in issuing a certificate of purchase, and the commissioner of the general land office, in issuing a patent, are but ministerial officers. *Arnold v. Grimes and Chapman*, 1.

LIBEL.

1. If a defendant in an action for libel, imputes a crime, and justifies in his defence, he must, in order to sustain his plea, adduce such evidence as would be required to convict the plaintiff, if on his trial for the crime imputed to him. *Frashee v. Abrams et al.*, 571.

2. Section 2772 of the Code, which provides, that in all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact, refers to criminal prosecutions, or trials upon indictments, and not to a civil proceeding to recover damages. *Ib.*

3. Where in such an action for libel, the defendants asked the court to instruct the jury as follows: "That they need not be satisfied, beyond a reasonable doubt, as to the matters of their defence, but it is only necessary that they should be satisfied from the evidence, and all the circumstances of the case before them, of the matters alleged in defence," which instruction the court refused to give; *Held*, That the instruction was properly refused. *Ib.*

LIEN.

1. Under the act entitled, "An act to prevent frauds," approved January 16, 1840 (Rev. Stat. 1843, 271), a judgment was a lien on an equitable interest in real estate. *Blain v. Stewart*, 378.

2. And where two mortgages on the same premises, were executed on the same day, one of which was filed for record, as appeared from the certificate on the mortgage, half an hour before the other; and where it appeared from the testimony of the mortgagor and others, that the mortgage last recorded, was first executed, and that the second mortgagee had actual notice of the execution of the first mortgage; *Held*, That the first mortgagee had a priority of lien. *Bell & Co. v. Thomas*, 384.

MALICE.

1. Where in an action for malicious prosecution, the defendant asked the

court to instruct the jury, "that if defendant has shown that he acted under the advice of counsel, malice cannot be inferred from the want of probable cause," which instruction was refused; *Held*, That the instruction was properly refused. *Center v. Spring*, 393.

2. To sustain an action for malicious prosecution, the plaintiff must show that the prosecution originated in the malice of the prosecutor, and without probable cause. *Ib*.

3. To prove express malice even, is not sufficient, unless the want of probable cause, is also shown. *Ib*.

4. The want of probable cause, cannot be inferred from express malice, but malice may be implied from want of probable cause. *Ib*.

5. Malice is, in all cases, a question of fact for the jury, and may be either express or implied. *Ib*.

MALICIOUS PROSECUTION.

1. Where the plaintiff brought an action against the defendant, charging the latter with having commenced a prosecution for larceny against him, and alleging that said prosecution was wrongful, and without any probable cause; that plaintiff was put to great trouble and expense in defending himself against said charge; that he was arrested and held in confinement under the warrant issued in said prosecution; and that he suffered great damage and injury by the said wrongful act of the said defendant; *Held*, That the action, though it need not have a technical name, must be governed by those rules and principles which obtain in actions for malicious prosecutions. *Center v. Spring*, 393.

2. Where in such an action, the defendant asked the court to instruct the jury, "that before the plaintiff can maintain *this action*, he must prove that the prosecution was malicious, and without probable cause," which instruction the court modified, by saying, that "such proof was necessary in order to maintain an action for malicious prosecution;" *Held*, That the court erred in thus modifying the instruction. *Ib*.

3. Where in an action for malicious prosecution, the defendant asked the court to instruct the jury, "that if defendant has shown that he acted under the advice of counsel, malice cannot be inferred from the want of probable cause," which instruction was refused; *Held*, That the instruction was properly refused. *Ib*.

4. And where in such an action, the defendant asked the court to instruct the jury as follows: "That if the jury find from the evidence, that the defendant acted upon the advice and opinion of counsel, given upon a fair statement of the real facts and circumstances in the case, they will find for the defendant," which instruction the court refused to give; *Held*, That the instruction was improperly refused. *Ib*.

5. But where the defendant misrepresents the facts to the counsel whom he consults; or where he does not act in good faith under the advice received; or where he does not himself believe that there is cause for the prosecution; or where counsel and client act in bad faith in originating and bringing the action, he will not be protected by the advice of counsel; and in such cases, the *bona fides* of his conduct, is a question of fact for the jury. *Ib*.

6. To sustain an action for malicious prosecution, the plaintiff must show that the prosecution originated in the malice of the prosecutor, and without probable cause. *Ib*.

7. To prove express malice even, is not sufficient, unless the want of probable cause, is also shown. *Ib*.

8. The want of probable cause, cannot be inferred from express malice, but malice may be implied from want of probable cause. *Ib*.

9. The question of probable cause, is a mixed one of fact and law, involving

two distinct considerations, to be determined by two different tribunals. The sufficiency of the circumstances to constitute probable cause, is a question of law for the court; and the evidence of the circumstances, is for the determination of the jury. *Ib.*

10. Malice is, in all cases, a question of fact for the jury, and may be either express or implied. *Ib.*

MANDAMUS.

1. Section 2183 of the Code, which provides that the writ of mandamus may be issued on the information, under oath, of the party beneficially interested, contemplates that either the public, through its officers, for the enforcement of a public duty, or an individual, having a right to be enforced, or an interest to be affected, may cause the writ to be issued, and not that every one who pleases may sue out the writ. *The State of Iowa, ex rel. Weir v. The County Judge of Davis Co.*, 280.

2. Where the petition or affidavit for a writ of mandamus, does not show any right or interest whatever in the relator, in connection with the object of the writ, the writ should not be allowed. *Ib.*

MEASURE OF DAMAGES.

1. The general settled rule of damage, both in England and the United States, for failing to deliver goods at a specified time and place, where the price is not paid before the time for delivery, is the difference between the contract and the market price, at the time delivery should have been made. *Cannon v. Folsom*, 101.

2. Where the price of the commodity contracted for, has been paid prior to the time for delivery, a somewhat different rule obtains: and in such case, the plaintiff is not confined in his recovery, to the difference between the contract and the market price on the day of delivery, but may recover the highest market price between the day for delivery and the time suit is brought, provided the plaintiff does not unreasonably delay the institution of his suit. *Ib.*

3. A party contracting to deliver goods at a specified time and place, where no express stipulations enter into the contract, to vary his liability, may be fairly presumed to have contracted with reference to these general rules. *Ib.*

4. Where a party contracted to deliver, at a specified time and place, a certain quantity of pine logs, at a given price; *Held*, In an action on the contract, that there was nothing in the contract which tended to show, that any other than the ordinary liability was stipulated for. *Ib.*

5. The value of the property, at the time of the conversion, with interest, is the measure of damages, where there is no claim for special damages. *Cutler v. Fanning*, 580.

MECHANICS' LIEN.

1. The action for a mechanic's lien, is not a proceeding against the property. *Redman v. Williamson et al.*, 488.

2. And where in an action to establish a mechanic's lien for the erection of a house on certain real estate, the petition alleged that the contract was made with W. acting for himself and the other defendants, the latter being the owners of the lot; and where W. failed to answer, and the other defendants answered, that they were the exclusive owners of the lot; that W. had no interest in it, and this fact was well known to plaintiff, at the time he made the contract with W.; and that W., if he made any such contract, acted without their knowledge or consent, and did not make the contract in their behalf, to which answer there was no replication; and where no evidence

was introduced, and the cause was submitted to the court on the pleadings, and the court found the issues for the plaintiff, and rendered judgment against the house; *Held*, That the judgment was unauthorized by law. *Id*.

MILL DAM.

1. The act authorizing the erection of mill dams, approved January 24, 1855, does not require that the petition for a writ of *ad quod damnum*, should be sworn to, and if the petition is signed by the counsel of the applicant, that is sufficient. *Gammell v. Potter*, 562.

2. Notice of the application for the writ, with a copy of the petition, must be served upon the defendant, before the petition is filed; and proof of service, by affidavit, must be filed with the petition. *Id*.

3. Where in a proceeding of *ad quod damnum*, the jury summoned by the sheriff, found that "the proposed dam will overflow twenty acres of the lands of the defendant; that by reason thereof, the said defendant will sustain damage to the amount of \$654, and do therefore appraise his damage at that amount; that the lands of no other person would be affected by said dam; and that no dwelling-house, out-house, garden, or orchard, of the said defendant, or any other person, would be overflowed, or injuriously affected thereby;" *Held*, That the inquisition was not only substantially, but technically and formally, correct. *Id*.

MORTGAGE.

1. Where a subsequent mortgagee has actual notice of a prior existing mortgage on the same premises, it is immaterial which was first recorded. *Bell & Co. v. Thomas*, 384.

2. And where two mortgages on the same premises, were executed on the same day, one of which was filed for record, as appeared from the certificate on the mortgage, half an hour before the other; and where it appeared from the testimony of the mortgagor and others, that the mortgage last recorded, was first executed, and that the second mortgagee had actual notice of the execution of the first mortgage; *Held*, That the first mortgagee had a priority of lien. *Id*.

3. Where on the third of March, 1852, G. and wife executed a mortgage to one L., on the west third of lots 10, 11, and 12, in block 30, in the city of Keokuk, to secure the payment of \$350.00, which was recorded April 21, 1852; and where, on the 17th of May, 1852, G. sold to C. and G. the same part of lot 10, the deed for which was recorded December 30, 1852, and in January, 1853, G. sold the same portions of lots 11 and 12 to B., whose deed was recorded April 5, 1853; and where the mortgage was sold by L. to one F., and by F. to C. & G., who in August, 1853, commenced suit against G. and wife, to foreclose said mortgage on lots 11 and 12, without making B. a party, in which suit a decree of foreclosure was rendered for \$383.07, which amount included, by agreement with the agent of G., the sum of \$54.36, for interest paid on money borrowed to purchase said mortgage, and attorney's fees for foreclosing the same; and where B., pending the proceedings, appeared by his attorney, and filed a paper in the cause, stating the respective purchases of himself and complainants, and asking that the lots purchased by him, be held liable to pay two-thirds only of said debt, and that the lot purchased by C. and G. should be liable for the remaining third, of which paper no notice was taken in the adjudication of the cause; and where, by virtue of the decree of foreclosure, the lots were sold by the sheriff, under a writ without the seal of the court, and purchased by R. for the amount of the decree and costs, who received a sheriff's deed therefor; and where B. then filed his bill, setting forth the foregoing facts, alleging, that the decree of foreclosure was obtained by fraud, and in prejudice of his

rights, and praying that the decree, as well as the sale to R., might be set aside, that R. might be enjoined from taking possession, or receiving the rents, under his pretended purchase, and the mortgage released, upon B. paying two-thirds of the mortgage debt; upon the hearing of which bill, the court found that B. purchased the property owned by him of G., without notice of the purchase of C. and G., and that the property of B., so purchased, was three times as valuable as that purchased by C. and G., and thereupon the court decreed, that the decree of foreclosure, and the sheriff's sale and deed to R. be set aside, so far as the said B. was affected—that B. and C. and G. should contribute to the satisfaction of the mortgage, in proportion to the value of the lots purchased by each—that R., the purchaser at the sheriff's sale, should recover three-fourths of the amount of his bid of B., the complainant, and one-fourth of C. and G., with six per cent. interest from the date thereof—that the incumbrance created by said mortgage be extinguished—that the decree of foreclosure stand as a judgment against G.—that C. and G. should assign three-fourths thereof to B.—and that each of the contesting parties pay one-third of the costs; *Held*, 1. That as B. would have a right before foreclosure of the mortgage, to bring a bill to redeem the premises from the incumbrance, and determine the amount, so he may, if not made a party to the suit to foreclose, file a like bill, to correct any mistake made in a decree which injuriously affects his rights. 2. That as B. was not made a party to the suit for foreclosure, in the first instance, nor by any subsequent order of the court, and inasmuch as the mortgage suit was determined without any reference to the paper filed by him in said cause, and his right to appear in such suit was neither recognized nor admitted, that B. did not make such an appearance in the mortgage suit, as that he is concluded by the decree in that case, and precluded from filing a bill to correct mistakes in that decree. 3. That B. was only bound to pay his proportion of what was actually owing on the mortgage; and that while the holder of the mortgage and the mortgagor might include the sum of \$54.36, for interest paid for money borrowed to purchase the same, and attorney's fees, yet it was manifestly improper to require B. to pay any part thereof, before he could hold his property divested of the mortgage lien. 4. That B. having purchased with notice of the mortgage, the mortgagee, by virtue of his prior lien, had the right to subject the property to the payment of his debt; but he had no right to subject it to the payment of any sum that the mortgagor might consent to include in the decree. 5. That B. should be required to pay his portion of the costs, in the foreclosure case, up to the time of rendering the decree, but that the costs subsequent to the decree he should not pay. 6. That the decree of the court below, so far as it charged the property purchased with the payment of the mortgage debt, in proportion to the respective value of each parcel, was correct, and that B. was properly required to pay three-fourths of the mortgage debt. *Bates v. Ruddick et al*, 423.

4. The value of land mortgaged, is what is presumed to have governed the mortgagee in taking his mortgage; and, by this value, should the respective liabilities of the subsequent purchasers be measured. *Id*.

5. Where a portion of the mortgaged premises are subsequently sold, the mortgagor retaining the remaining part, the portion unsold should, in equity, first be subjected to the payment of the mortgage debt. *Id*.

6. While the mortgage covers, and is a lien on, all the estate alike, yet the mortgagor, in addition to his legal obligation, arising as well from the mortgage, as his covenants in his deed to the subsequent grantee, is morally bound to pay the debt, and divest that which he has sold, of any incumbrance. *Id*.

7. In like manner, on his death, the heir occupies his place, and, sitting in the seat of the ancestor or original grantor, is bound to discharge the debt, to the extent of the assets descending. *Id*.

8. The junior, as well as the senior, purchaser of mortgaged premises, makes an absolute purchase; each pay a full consideration, and have a like reason to

suppose that the mortgage debt will be paid, and their estates held alike divested of the incumbrance. *Id.*

9. While each has purchased absolutely, yet, if the mortgage should not be discharged, they acquire no more than the right to redeem the parcel held by each; and neither should complain, if, by the decree which settles their respective rights, he is secured the equity thus acquired, upon equal terms. *Id.*

NEGRO.

1. Under section 2388 of the Code, a negro cannot be allowed to give testimony in a cause where a white person is a party. *Motts v. Usher & Thayer*, 82.

2. And where in an action wherein a negro was the plaintiff, and the defendants were white persons, the defendants offered a negro as a witness, who was objected to, on the ground of incompetency, which objection was sustained; *Held*, That the witness was properly excluded. *Id.*

NEW TRIAL.

1. Where a motion was made in a criminal case, for a new trial upon the ground that after the jury had retired, and before they returned into court, with their verdict, two of the jurors separated from their fellows, and conversed with other persons about their verdict; which motion was supported by an affidavit, which alleged "that after the jury retired to consider their verdict in the above cause, on Monday evening, and before they had returned their verdict into court on the Tuesday morning following, two of the jurors separated from their fellows, and were in the office of the affiant, and conversed in his presence about the case; and that afterward, they were present when the verdict was presented to the court," which motion was overruled; and where it appeared from the record, that on the day of trial, the parties agreed that the jury should seal up their verdict, after agreeing upon it, and return it into court on the next morning, and that on the next morning the jury returned a written and sealed verdict; *Held*, That the affidavit did not show that the jurors conversed with other persons, and that there was no error in overruling the motion. *Sanders v. The State*, 230.

2. Where the court has misdirected the jury on an immaterial point, or on a question not important to the decision of the cause on its merits, a new trial will not be ordered. *The Western Stage Co. v. Walker*, 504.

3. Section 1810 of the Code, which provides, that in applications for new trials, the affidavits of jurors may be taken and used in relation to such applications, was not designed to compel jurors, by rule, to answer under oath as to how, or in what manner, they made up their verdict. *Forshes v. Abrams et al.*, 571.

NOTICE.

1. As between conflicting entries, the doctrine of notice is utterly discarded. *Arnold v. Grimes and Chapman*, 1.

2. The rule that the elder title from government must prevail, holds in relation to the government only, where the doctrine of notice does not apply. *Gourley v. Hankins*, 75.

3. In order to give this court jurisdiction over an appellee, he must be served with notice in some manner, and this service is as essential to give jurisdiction, where there is no voluntary appearance, as it is in the District Court. *Id.*

4. When the judgment is against the plaintiff in the court below, in cases where there has been no personal service on defendant, and no appearance

made by him, and his residence is still unknown, the Code provides no method for giving notice of appeal. *McClellan v. McClellan*, 312.

5. The appellant must have his notice of appeal returned not found, before he makes his publication. *Ib.*

6. The notice must be published in a newspaper, as convenient as practicable to the court where the action was commenced, to be determined by the clerk of such court; and should be published for four successive weeks, the last publication to be at least fifteen days prior to the commencement of the term at which the appeal is to be heard. *Ib.*

7. The same proof and affidavit of the service will be required, as is provided for in similar cases in the District Court, by section 1826 of the Code. *Ib.*

8. If the appellee is a non-resident, and has an agent or attorney within the state, the notice should be given him, instead of by publication. *Ib.*

9. Where a party has actual notice of the existence of a deed, he is affected by it, even though no certificate of acknowledgment is indorsed on the deed. *Müller v. Chittenden et al.*, 315.

10. Where a subsequent mortgagee has actual notice of a prior existing mortgage on the same premises, it is immaterial which was first recorded. *Bell & Co. v. Thomas*, 384.

11. The papers referred to in section 1732 and chapter 133 of the Code, are not the private papers and notices between parties, in their ordinary business transactions, and which may relate to, or form the foundation of a right; but those intended in the statute, are such as pertain to, or may be required in, an action in court. *Hollingsworth, Ex. v. Snyder*, 435.

12. The service of a written notice to quit, by a landlord upon his tenant, cannot be proved by the written return and affidavit of the person making the service. *Ib.*

OFFICER.

1. In relation to officers, civil and criminal, when the question arises between third parties, parol evidence is admissible to show that they were officers at a given time, and perhaps, to show that they acted as such. *Gourley v. Hankins*, 75.

2. As between third persons, when the question is, whether a person doing an act was an officer, it is sufficient to show him to be such *de facto*; and it is not required of the party claiming or justifying under the act of the officer, to prove that he was such, by the highest and best evidence. *Ib.*

3. The highest and best evidence is required only, when the officer himself is a party, and he justifies or claims by virtue of his office. *Ib.*

4. Section 175 of the Code, which provides that no sheriff, deputy sheriff, coroner, or constable, shall appear in any court as attorney or counsel for any party, &c., does not prohibit peace officers from making complaint of the violation of the penal laws of the state. *Santo et al. v. The State*, 165.

ORDERS.

1. The intermediate orders spoken of in section 1556 of the Code, are clearly those orders which may be made in the *enit proper*, and not those proceedings which are entirely distinct from it. *The First Cong. Church of Bloomington v. The City of Muscatine*, 69.

OVERRULED CASES.

1. *Marshall v. Chittenden et al.* (not reported), so far as it holds that the trustees under the deed of J. McK. to C. and others, dated December 25, 1846, after the death of said McK., held the estate for his heirs, overruled. *Müller v. Chittenden et al.*, 315.

PARENT AND CHILD.

1. Where in an action of trespass for an assault and battery against a father and son, the plaintiff dismissed his suit as against the son; and on the trial, the father offered the son as a witness, who, being objected to, was held not be a competent witness, on the ground of being a party to the record, and interested in the result of the suit; *Held*, That the plaintiff, by dismissing his suit as to the son, became liable for the costs consequent upon his having been made a party, and the competency of the son as a witness, was as undoubted as if he had never been connected with the record. *Hill v. Rogers*, 67.

2. In order to justify an assault by the father, in the defence of his son, of the protection of his own property, it is not necessary that such son shall be in real danger of great bodily harm, or that such property be in actual danger of material injury; but if the danger is such as to induce a person, exercising a reasonable and proper judgment, to interfere, in order to prevent the consummation of the injury, it is sufficient. *Ib.*

PARTITION.

1. Where in an action for the partition of real estate, the plaintiff made certain parties defendants, set out their pretended claim to the land, averring that said claim was a cloud upon his title, and prayed for its removal; and where these defendants, in their answer, set up their title, and called upon the plaintiff, as well as other persons, whom they made defendants, to answer as to a cross bill; and where the parties, without making objection, did so answer, and where the parties subsequently entered into an agreement, that the case should be treated in all respects as a proceeding in chancery; and where on the hearing of the case in the Supreme Court, it was urged, for the first time, that the equitable rights of the parties to the land could not be adjudicated in this action; *Held*, That the objection was made too late. *Miller v. Chittenden et al.*, 315.

PARTNERS.

1. Each partner has a specific lien on the partnership stock, not only for the amount of his share, but for moneys advanced by him beyond that amount, for the use of the copartnership, as also for moneys abstracted by his copartner beyond the amount of his share. *Pierce v. Wilson et al.*, 20.

2. But this right or lien is subordinate to the right of the joint creditors, to be first paid from the partnership capital, funds, or stock. *Ib.*

3. And where one partner sold two-thirds of the partnership property, in fraud of the rights of his copartner, whereby the partnership was dissolved, the purchasers having notice of the interest of the other partner; *Held*, That the purchasers took the property, subject to the right of the other partner to a lien for moneys advanced. *Ib.*

4. In all matters within the scope of partnership dealings, or falling within the ordinary business and transactions of the firm, so long as the relation exists, each partner has the right and power to bind the partnership. *The Western Stage Co. v. Walker*, 504.

5. By virtue of the relation, each partner is constituted the general agent of the firm, and is vested with a power enabling him to act at once as principal, and as the authorized agent of his copartners. *Ib.*

6. Whilst each partner may bind the partnership by his contract, in any matter within the limits of the partnership business, he cannot bind it by any contract beyond those limits; and a dissolution of the partnership, puts an end to his authority. *Ib.*

7. But where the partnership has contracted engagements which cannot be fulfilled during the time limited for its existence, the partnership must con-

since, for the purpose of performing such outstanding engagements, and of taking and settling all accounts, and converting the property, means, and assets of the partnership, existing at the time of its dissolution, for the benefit of all interested, although for all other purposes it is actually dissolved. *Id.*

8. In the fulfillment of the outstanding engagements of the firm, and in the settlement of its business generally, the authority of each member remains the same after, as before, the dissolution. *Id.*

9. The rights of the different partners are not changed by dissolution. Where there is no stipulation in the articles of copartnership to limit or control their rights, a majority of the partners, *acting fairly, and in good faith*, may conduct the partnership business, notwithstanding the dissent of a minority. *Id.*

10. Where a contract, made by a majority of a firm, is not made in *good faith*, as to the other partners, the interest of the partners making the contract, only passes to the purchaser, and he becomes a joint owner with the partners whose interest did not pass. *Id.*

PARTY IN INTEREST.

1. Where an action of trespass was brought in the name of "The State of Iowa, who sues for the use and benefit of the Des Moines navigation and railroad company," and the petition alleged that the trespass was committed on certain lands "belonging to, and being the property in fee simple of, the said state of Iowa;" and where the petition was demurred to, on the ground that it appeared from the petition, that the plaintiff had no interest in the subject matter of the suit, and that the real party in interest should sue for a trespass, and not another for his use, which demurrer was overruled; *Held*, That the words "for the use and benefit of the Des Moines navigation and railroad company," were mere surplusage, and that the demurrer was properly overruled. *The State v. Butterworth*, 158.

2. Section 1676 of the Code, which provides that civil actions must be prosecuted in the names of the real party in interest, has reference, at least in part, to sections 949 and 952, which make claims assignable by writing, which before were not, so as to enable the assignee to sue in his own name. *Id.*

PATENT.

1. The register of a land office, in issuing a certificate of purchase, and the commissioner of the general land office, in issuing a patent, are but ministerial officers. *Arnold v. Grimes and Chapman*, 1.

2. Where A., under the act of Congress of 1840, applied for a pre-emption, and took the oath required by the act of Congress, of 1838, and his claim was allowed by the receiver, and the register issued to said A. a certificate of purchase for the said land; and where the right of A. to the pre-emption, being contested by C., the commissioner of the general land office, directed the local land officers to hear testimony on the subject of the contest, and the commissioner subsequently canceled the certificate of A.; and where C., then claimed, and proved up a pre-emption to the same parcel of land, under the act of 1841, received his certificate, March 21, 1843, and on the same day conveyed the land to G., in trust for the benefit of his creditors; and where a patent issued to C. on the 8th of March, 1845, and a patent was issued to A. on the 14th of March, 1849, which recited that the patent to C. had been revoked and canceled, being illegal; *Held*, 1. That when the government sold to A. in 1840, she parted with all her power over the land. 2. That the substantial right was in A., and that the government held the title in trust for him, and could make no further sale which would be valid, unless his purchase should first be set aside in a proper legal proceeding. 3. That A. having obtained a patent, it attached in law to his original purchase, and his title was perfected. 4. That

the commissioner of the general land office, possessed no power, to cancel A.'s certificate of purchase. *Ib.*

3. Land, once sold or appropriated by the government, even though not patented, cannot be sold again. *Ib.*

4. A junior patent under the first entry, will overreach an elder patent under a junior conflicting entry. *Ib.*

5. Where a patent has been issued through a mistake or fraud, to an individual who was not entitled to it, a court of equity will control the right of the patentee, by compelling him to convey to the person who has the better right. *Ib.*

PETITION.

1. The character of a proceeding—whether at law or in equity—is to be determined by the prayer and conclusion of the petition. *The Christian Church at Fella v. Scholle*, 27.

2. Where a petition claims that the plaintiff has a valid, subsisting interest in the property described in the petition; that he has a right to the immediate possession thereof, and to the ownership in fee simple; and prays that he may recover the immediate possession thereof, with damages for the detention of the property, the proceeding is at law, and not in equity. *Ib.*

3. In an action against a boat, for labor and materials furnished, a petition which alleges that such labor and materials were furnished at the instance and request of the said boat, is sufficient. *West & Co. v. Barge Lady Franklin*, 522.

4. The petition, in such a case, need not allege that the work was done, or materials furnished, on a contract made with the master, owner, agent, clerk, or consignee, of said boat. *Ib.*

5. In *scire facias* on a forfeited recognizance, no petition is necessary. The record on which the writ is based, stands in the place of a petition. *The State v. Foster*, 559.

PLEADING.

1. The pleadings before a justice of the peace, may be written or oral; and when oral, they must, in substance, be entered by the justice on his docket. But, in no case, is it necessary that the justice should set the same out with the particularity required in a formal petition. He is to give the substance of what the plaintiff claims, and more than this is not required. *Stone v. Murphy*, 35.

2. It is not competent to enlarge a written contract by parol evidence, or by special pleading. *Cannon v. Folsom*, 101.

PRACTICE IN CIVIL CASES.

1. An objection not raised in the court below, cannot avail the party in the appellate court. *McGregor, Laws & Blackmore v. Armist*, 30.

2. An action of trespass *quare clausum fregit*, so relates to real property, as to authorize the prosecution of the suit in the county where the realty is situated, even though the defendant may reside in a different county. *Barnes v. Davis et al.*, 160.

3. A party is not confined to twenty days after judgment is rendered against him by a justice of the peace, within which to sue out a writ of error. *Mudgett v. Park*, 287.

4. A replication under oath, to an answer calling for such sworn replication, need not contain more than a reference to the specific allegations contained in the answer. *McConnoughy v. Weider*, 408.

5. By sections 1744, 1745, and 1746, of the Code, the replication may be required to be under oath, but in all other respects, it need not differ from that provided for in the sections immediately preceding. *Ib.*

6. If such pleading is evasive, or fails to deny, or respond to, the allegations contained in the pleading to which it professes to respond, the same consequences follow that are contemplated by section 1742. *Ib.*

7. Where there is no showing to the contrary, the appellate court will presume that the county to which the venue has been changed, is the most convenient, within the meaning of the law. *Allen v. Skiff*, 433.

8. If the party complaining wishes to show error in the order for the change of venue, he should embody all the facts, upon which the court acted, in a bill of exceptions, so that this court can see that the county selected, is *not* the most convenient. *Ib.*

9. The Supreme Court will regard no assignment of error, based upon the giving or refusing any instruction in the court below, unless it appears that exception was taken at the time, and the instruction embodied in a bill of exceptions, and made part of the record. *Ewing v. Scott et al.*, 447.

10. To make the instructions of the court a part of the record, they must be embodied in a bill of exceptions. Otherwise, they will not be so regarded, though they may be in writing, and copied into the transcript by the clerk. *Ib.*

11. When a new and special right or power is given, and its mode and circumstances are prescribed, these must be obeyed substantially. *Ham v. Steamboat Hamburg*, 460.

12. Where a party declares specially, he must succeed upon his special case and cannot recover as upon the common counts. *Eyser v. Weissgerber*, 463.

13. Where the instructions are so confused, that it is evident that the jury was misled, and acted at random, to the probable prejudice of the appellant, a new trial will be ordered. *Ib.*

14. But where the instructions in chief, and those asked by, and given for, the appellant, are conflicting merely, and the latter are incorrect, such conflict will not be a sufficient cause for reversal. *Ib.*

15. Where the court has misdirected the jury on an immaterial point, or on a question not important to the decision of the cause on its merits, a new trial will not be ordered. *The Western Stage Co. v. Walker*, 504.

16. The question as to the correctness of a decision of the District Court must first be raised in that court, by bill of exceptions, before it can be passed upon by the appellate court. *Ib.*

17. A motion to compel a party to produce a paper, the existence of which is not shown by the record, must be supported by an affidavit, showing the requisite facts. *Johnson & Stevens v. Buller*, 535.

18. But whether such an affidavit is required, when the record does show the former existence of such paper, *quere?* *Ib.*

19. In an action upon a judgment recovered in another state, the defendant cannot plead any defence which he might have made in the former suit. *Ib.*

20. In such an action, the plaintiff can, *by pleading*, be compelled to show enough of the record, to prove a valid judgment recovered; but he cannot, by motion, be obliged to produce any particular part of the record. *Ib.*

21. And where, in such an action, the defendant filed a motion, that the plaintiff be ruled to complete the record, by filing a certain paper described in the motion, which motion was sustained; and where, the paper not being produced, the court rendered judgment of nonsuit against the plaintiff; *Held*, That the court erred in sustaining the motion, and dismissing the suit. *Ib.*

PRACTICE IN CHANCERY CASES.

1. Where the denials in an answer in chancery, are positive and unequivocal, and made under oath, they must be overcome by the testimony of two credible witnesses, or other evidence of equivalent weight and force. *Pierce v. Wilson et al.*, 20.

2. On an appeal in chancery, the facts, as well as the law of the case, are reviewed and re-adjudicated by the Supreme Court; and upon an examination of the whole case, this court will render such a decree as should have been entered in the first instance, consistent with the case made by the bill, and sustained by the proof. *Ib.*

3. Where in a suit to enforce the specific performance of a contract the defendant alleged that the contract ought to be enforced, had been obtained by the fraudulent representations of the complainant, setting out the alleged representations; and where the respondent requested a jury to try the issues of fact raised by the pleadings, and a jury was thereupon called, and issues submitted to them, among which was the following: "Did the complainant procure the execution of said bond by means of false and fraudulent inducements held out by him to the respondent?" to which the complainant objected; and where the jury found the said issue in favor of the respondent; *Held*, That the issue presented to the jury, was broader than that made by the pleadings, and was erroneous. *Brink v. Morton et al.*, 411.

4. And where in such a case, upon an issue of fraud in procuring the execution of a contract, the jury found for the respondent, and the court thereupon dismissed the bill of the complainant; and where the evidence submitted, did not support the finding, the Supreme Court reversed the decree, and refused to submit the issue to a jury a second time, but instructed the court below to render a decree in favor of the complainant. *Ib.*

5. Where a complainant's bill contains no equity, the defect is fatal, even on final hearing, or in the appellate court. *Cowles et al. v. Shaw et al.*, 496.

6. The chancellor may decide questions of fact himself, and refuse an issue to a jury, or he may, in the exercise of a sound discretion, direct such an issue; and in either event, the appellate court will not disturb such order, unless it appears that such discretion has been abused, and exercised in a manner unwarranted by all the circumstances. *McDaniel et al. v. Marygold et al.*, 500.

7. Unless the finding of the jury is unconscionable, it should be allowed to stand. *Ib.*

8. By the same rule, will this court be governed, in the exercise of its appellate power, in determining like cases. *Ib.*

PRACTICE IN CRIMINAL CASES.

1. Where the defendants in a criminal proceeding before a justice of the peace, appeared and had a trial, without objecting to the information or warrant; and where, on appeal, the objection to the information and warrant was first raised in the District Court, which objection was not included in the affidavit for the appeal, and was overruled by the District Court; *Held*, That the defendants having appeared before the justice, and had a trial, without testing the sufficiency of the information and warrant, and it not being assigned as an error in the affidavit for the appeal, the objection was properly overruled. *Santo et al. v. The State*, 185.

2. And where on appeal in a criminal case, the District Court refused to grant a new trial on the errors assigned in the affidavit of appeal, and refused the defendants a trial by jury; *Held*, That the District Court did not err in refusing a trial by jury. *Ib.*

3. Where a motion was made in a criminal case, for a new trial upon the ground that after the jury had retired, and before they returned into court, with their verdict, two of the jurors separated from their fellows, and con-

versed with other persons about their verdict; which motion was supported by an affidavit, which alleged "that after the jury retired to consider their verdict in the above cause, on Monday evening, and before they had returned their verdict into court on the Tuesday morning following, two of the jurors separated from their fellows, and were in the office of the affiant, and conversed in his presence about the case; and that afterward, they were present when the verdict was presented to the court," which motion was overruled; and where it appeared from the record, that on the day of trial, the parties agreed that the jury should seal up their verdict, after agreeing upon it, and return it into court on the next morning, and that on the next morning the jury returned a written and sealed verdict; *Held*, That the affidavit did not show that the jurors conversed with other persons, and that there was no error in overruling the motion. *Sanders v. The State*, 230.

4. This court will not presume against the regularity of the proceedings, after verdict, as to those matters which the law does not require to be incorporated in, or shown by, the transcript. *Sharp v. The State*, 454.

5. A writ of error on the part of the state, cannot be sued out in a criminal case. *The State v. Johnson*, 549.

6. Ordinarily, the presumption is in favor of the regularity of the proceedings of the District Court, and that such court had (where the contrary is not shown), sufficient evidence to justify the judgment rendered. *Skiff v. The State*, 550.

PRE-EMPTION.

1. Under the act of Congress of 1830, regulating pre-emption, there was no appeal from the decision of the register and receiver, allowing a pre-emption, and there was no appeal in such cases, until the act of 1841, when an appeal was given to the secretary of the treasury, by one whose claim for a pre-emption was rejected. *Arnold v. Grimes and Chapman*, 1.

2. Where C. by means of a deed, which he had obtained by fraud and duress, contested A.'s right to a pre-emption, which was set aside; and where C. then obtained a pre-emption on the same land, received a certificate of purchase, and on the same day, assigned the certificate to G. in trust for the benefit of his creditors; and where G. admitted that he was cognizant of all the early facts of the case, and it appeared that G. had been a party to a suit by A. against C. to set aside the deed, and the decree in favor of A. vacating the deed, was rendered fourteen days before the issuance of the patent to C. under his certificate, which patent was subsequently revoked and canceled by the commissioner of the general land office; *Held*, That G. in point of fact, was a purchaser, with notice of all A.'s rights; and in point of law, he stood in the same attitude as C. himself. *Id.*

PROPERTY TAKEN FOR PUBLIC USE.

1. Section eighteen of the first article of the constitution of the state of Iowa, which provides that private property shall not be taken for public use, without just compensation, means that the person whose property is so taken, shall have a fair equivalent in money, for the injury done him by such taking. *Henry v. The Dubuque and Pacific Railroad Company*, 288.

2. The term "damages," in the fourth section of the act entitled "An act granting to railroad companies the right of way," approved January 18, 1853, has relation to the provision of the constitution under which the property may be taken, and is precisely synonymous with the phrase "just compensation," there used. *Id.*

3. The just compensation to which the owner of the land is entitled, should be precisely commensurate with the injury sustained by having the property taken—neither more nor less. *Id.*

RAILROAD.

1. The right of way conferred by the statute, and acquired by a railroad company, is the right of way peculiar to a *railroad*, and contemplates all which is necessary and proper for the construction and maintenance of a railroad over the premises. *Henry v. The Dubuque and Pacific Railroad Company*, 288.
2. It is the right (within the limits of quantity, as allowed by the statute to be taken), to all freedom in locating, constructing, and conveniently using and repairing the road and its appurtenances; and for such purpose only, of taking, removing and using any earth, gravel, stone, timber, or other materials, on or from the land so taken. *Ib.*
3. As a railroad is designed to be a level road, or nearly so, the right to construct, includes the right to make deep cuts, or high embankments, as the topography of the land may require. *Ib.*
4. As the convenient use of a railroad contemplates rapid locomotion, all the rights necessary thereto, as against the owner of the fee, are incident to the appropriation of the land for railroad purposes. *Ib.*
5. The right of way acquired by a railroad company, is not limited to the life of the charter, or articles of incorporation, of the company, but is intended to be perpetual, if the company, its grantees, or assigns, continue to occupy the land for the purposes for which it was appropriated. *Ib.*
6. The fee of the land appropriated for railroad purposes, remains in the owner, subject to the easement acquired by the company; and the rights of the company and those of the owner in fee, are as distinct and separate, and each is as independent of the other, as the rights of adjoining land owners in fee. *Ib.*
7. Any *reciprocal relation* that subsists between railroad companies and the owners of the fee of land, is either founded on agreement, or created by statute; and the only relation of this character, which exists by statute, is that created by section sixteen of the act granting to railroad companies the right of way, approved January 18, 1853, which provides that where a person owns land on both sides of the road, the corporation may be required to furnish a crossing. *Ib.*
8. As no reciprocal obligation exists between the owner of the right of way over, and that of the fee, in land, whereby either may compel the other to fence, the *building of fence* is not necessarily an element to be taken into consideration by the commissioners, in assessing the damage occasioned by the right of way. *Ib.*
9. The proper mode of ascertaining the damages occasioned by taking the right of way over land, is to determine the fair marketable value of the premises before the right is set apart, and then again after; and the difference will be the true measure of damage; and when paid, will be, in a legal sense, just compensation. *Ib.*
10. The *present values*, taking into consideration the extent of the rights conferred, are those which are to be arrived at; and the *immediate and necessary consequences* of parting with the right conferred, must necessarily enter into the consideration of the commissioners, in assessing the damages. *Ib.*
11. The premises, as *left* in the condition they will be, after the right of way is taken, together with the damages assessed, should be equal in value to the premises, immediately before the taking of such right of way. *Ib.*
12. In assessing the damages, all the circumstances that *immediately* depreciate the value of the premises, by taking the right of way, are proper to be considered, and none others. *Ib.*
13. In case the land was fenced, and by taking the right of way, it is thrown open, and left in a manner unfenced, this fact will be taken into consideration in arriving at the depreciated value of the remaining premises. *Ib.*
14. How the road may affect the value of the land, if completed, or any other

consideration of *future* benefit; or any *abuse* of the privilege, or probability of abuse, by the company; or any unwillingness on the part of the owner to allow the road to go over his land, is not in any manner to be considered, in the assessment of the damages, arising from taking the right of way. *Ib.*

15. Where an appeal is taken from the finding of the commissioners appointed to assess the damages created by taking the right of way, and the appeal is heard in the District Court before a jury, the witnesses called by the respective parties, may be permitted, on their examination in chief, to give their *opinion* of the *value* of the premises *before and after* the taking of the right of way, leaving the opposite party, by his right of cross-examination, to learn the ability of the witness to judge in the premises, and what he takes into consideration in making up his judgment. *Ib.*

16. But in such cases, the opinions of the witnesses must be confined to the premises over which the right of way is taken. *Ib.*

17. Where no statutory regulation exists, defining the duties of railway companies as to fence, they are under no obligation to erect fences between their road and the adjoining land. *Ib.*

18. Where in an action against a railroad company for damages, in taking certain real estate for the construction of their road, the jury found for the plaintiff a certain sum for his damages, and a certain other sum for building a fence and keeping the same in repair, for the aggregate of which sums, judgment was rendered against the company; and where it was not specifically shown in the special verdict, that plaintiff was allowed for building a fence, *as fence*, and thereupon it was urged that the case did not come within the rule laid down in *Henry v. The Dubuque and Pacific Railroad Co.*, ante, 288; *Held*, That there was no substantial difference between the two cases, and that the judgment must be reversed. *Kennedy v. The Dubuque and Pacific Railroad Co.*, 521.

RECOGNIZANCE.

1. Chapter 198 of the Code, which requires the prosecuting attorney to sue out a *scire facias* against the bail, where default has been made in criminal cases, even if applicable to recognizances before justices (which may well be doubted), does not negative or preclude the right to proceed by action on the bond. *The State v. Gorley and Cloud*, 52.

2. The remedy by action on the recognizance, in the nature of an action of debt, is not taken away by chapter 198 of the Code. *Ib.*

3. Where in a criminal proceeding before a justice, the justice entered on his docket the failure of the defendant to appear; *Held*, That in an action on the recognizance against the bail, the docket of the justice, or a transcript therefrom, must be taken as verity, and cannot be contradicted, by showing that the defendant did appear. *Ib.*

4. Where, in an action on a recognizance against the bail, a transcript from a justice of the peace was offered in evidence, which contained an entry as follows: "February 6th, 1854, the day and time set for examination, the defendant, John R. Gorley, did not appear; it was therefore considered, that the bond was forfeited by said Gorley, and D. C. Cloud, security for said Gorley, stands bound to the state of Iowa, on said bond. Thomas Carroll, Justice of the Peace;" *Held*, That the justice's docket did not show such a default on the part of Gorley, as fixed the defendant's liability on the recognizance. *Ib.*

5. Chapter 124 of the Code, refers to civil cases, or applications to revise judgments; and chapter 198 has reference to forfeited recognizances in criminal cases. *The State v. Foster*, 559.

6. In *scire facias* on a forfeited recognizance, no petition is necessary. The record on which the writ is based, stands in the place of a petition. *Ib.*

7. The record is an entirety, and must all be taken together, and when so considered, must show the right of the state to have the recognizance estreated; but all these things need not appear in the *scire facias*. *Ib.*

8. Where a *scire facias* on a forfeited recognizance, recited that the recognizance was entered into on the 13th of September, 1854: that the person charged was in custody of the sheriff of Davis county (in which county the indictment was found); that he and his surety entered into an obligation in open court, conditioned that the principal should appear at the next term of the District Court of Appanoose county, Iowa, it being the September term of said court, to answer to said charge contained in the indictment; and that at the said September term, to wit: on the 19th day of September, 1854, the said principal was duly called as the law requires, and made default; *Held*, That the writ contained sufficient to entitle the state to a judgment. *Ib*.

RECORD.

1. The transcript of the proceedings upon the *record*, mentioned in section 8273 of the Code, which provides that upon the making of an order granting a change of venue, the clerk must make out and certify a transcript of all the proceedings appearing upon the record of the court, &c., relates to the entries made in what is known as the "record book," under section 145, which, with the other books therein mentioned, and the papers in the different causes, constitute the records of the court. *Sharp v. The State*, 454.

2. It is not necessary that a transcript from the District Court, should show affirmatively, when, or how, or under what circumstances, the regular term of that court was adjourned. *Ib*.

3. This court will not presume against the regularity of the proceedings, after verdict, as to those matters which the law does not require to be incorporated in, or shown by, the transcript. *Ib*.

RELIGIOUS SOCIETIES.

1. The first section of the act, entitled, "An act relative to religious societies," approved February 7, 1844, does not limit the *quantity* or *value* of the property that may be held by a religious society, but alone restricts the *purposes* for which it may be acquired and applied. *Miller v. Chittenden et al*, 315.

2. A grant to trustees, for the use and benefit of a church to be afterwards organized, with no power in the trustees to create the beneficiary, or to appropriate the land, or funds arising therefrom, for any purpose, until such organization, will be upheld so as to pass the title, if such church shall afterwards, within a reasonable time, be so created or brought into existence, as to acquire and hold property, or be the recipients of a charity. *Ib*.

REPLEVIN.

1. Where, in action of replevin, the jury found for the defendant, as to the right of property and the right of possession, and assessed his damages at a certain sum, but did not find the value of the property replevied; *Held*, That this court must presume, that the jury were properly instructed as to the measure of damages, and that the finding of the value of the property was a matter of form. *The Western Stage Co. v. Walker*, 504.

REPLICATION.

1. A replication under oath, to an answer calling for such sworn replication, need not contain more than a reference to the specific allegations contained in the answer. *McConnoughey v. Weider*, 403.

2. By sections 1744, 1745, and 1746, of the Code, the replication may be required to be under oath, but in all other respects, it need not differ from that provided for in the sections immediately preceding. *Ib*.

3. If such pleading is evasive, or fails to deny, or respond to, the allegations contained in the pleading to which it professes to respond, the same consequences follow that are contemplated by section 1742. *Ib.*

4. Where in an action for money had and received, the defendant answered, admitting the receipt of the money, but averred that he inclosed the same in a letter, and deposited it in the proper post-office, to plaintiff's address, at his request, and that plaintiff had received the same by due course of mail, which answer was sworn to, and called for a reply under oath; and where the plaintiff replied under oath, negating the new matter set up in the answer; and where the defendant moved to strike the replication from the files, for the reason that it was not sworn to according to law, and as required by the answer, but the motion did not specify wherein it was not properly sworn to, which motion was overruled by the court; and where the cause was submitted to the court, on the petition, sworn answer, and sworn replication, without any testimony, and the court rendered judgment for the plaintiff; *Held*, 1. That the replication was sufficient, 2. That the motion to strike from the files, was properly overruled; and 3. That the court did not err in rendering judgment for the plaintiff on the pleadings. *Ib.*

RIGHT OF WAY.

1. The right of way conferred by the statute, and acquired by a railroad company, is the right of way peculiar to a railroad, and contemplates all which is necessary and proper for the construction and maintenance of a railroad over the premises. *Henry v. The Dubuque and Pacific Railroad Company*, 288.

2. It is the right (within the limits of quantity, as allowed by the statute to be taken), to all freedom in locating, constructing, and conveniently using and repairing the road and its appurtenances; and for such purpose only, of taking, removing and using any earth, gravel, stone, timber, or other materials, on or from the land so taken. *Ib.*

3. As a railroad is designed to be a level road, or nearly so, the right to construct, includes the right to make deep cuts, or high embankments, as the topography of the land may require.

4. As the convenient use of a railroad contemplates rapid locomotion, all the rights necessary thereto, as against the owner of the fee, are incident to the appropriation of the land for railroad purposes. *Ib.*

5. The right of way acquired by a railroad company, is not limited to the life of the charter, or articles of incorporation, of the company, but is intended to be perpetual, if the company, its grantees, or assigns, continue to occupy the land for the purposes for which it was appropriated. *Ib.*

6. The fee of the land appropriated for railroad purposes, remains in the owner, subject to the easement acquired by the company; and the rights of the company and those of the owner in fee, are as distinct and separate, and each is as independent of the other, as the rights of adjoining land owners in fee. *Ib.*

7. Any reciprocal relation that subsists between railroad companies and the owners of the fee of land, is either founded on agreement, or created by statute; and the only relation of this character, which exists by statute, is that created by section sixteen of the act granting to railroad companies the right of way, approved January 18, 1853, which provides that where a person owns land on both sides of the road, the corporation may be required to furnish a crossing. *Ib.*

2. Chapter fifty-two of the Code, regulating partition fences, is not applicable as between the owner in fee of land and a company having a right of way for a railroad over such land. *Ib.*

9. As no reciprocal obligation exists between the owner of the right of way over, and that of the fee, in land, whereby either may compel the other to fence, the building of fence is not necessarily an element to be taken into con-

sideration by the commissioner, in assessing the damage occasioned by the right of way. *Ib.*

10. The proper mode of ascertaining the damages occasioned by taking the right of way over land, is to determine the fair marketable value of the premises before the right is set apart, and then again after; and the difference will be the true measure of damage; and when paid, will be, in a legal sense, just compensation. *Ib.*

11. The *present values*, taking into consideration the extent of the rights conferred, are those which are to be arrived at; and the *immediate* and *necessary consequences* of parting with the right conferred, must necessarily enter into the consideration of the commissioners, in assessing the damages. *Ib.*

12. The premises, as *left* in the condition they will be, after the right of way is taken, together with the damages assessed, should be equal in value to the premises, immediately before the taking of such right of way. *Ib.*

13. In assessing the damages, all the circumstances that *immediately* depreciate the value of the premises, by taking the right of way, are proper to be considered, and none others. *Ib.*

14. In case the land was fenced, and by taking the right of way, it is thrown open, and left in a manner unfenced, this fact will be taken into consideration in arriving at the depreciated value of the remaining premises. *Ib.*

15. How the road may affect the value of the land, if completed, or any other consideration of *future* benefit; or any *abuse* of the privilege, or probability of abuse, by the company; or any unwillingness on the part of the owner to allow the road to go over his land, is not in any manner to be considered, in the assessment of the damages, arising from taking the right of way. *Ib.*

16. Where an appeal is taken from the finding of the commissioners appointed to assess the damages created by taking the right of way, and the appeal is heard in the District Court before a jury, the witnesses called by the respective parties, may be permitted, on their examination in chief, to give their *opinion* of the *value* of the premises *before and after* the taking of the right of way, leaving the opposite party, by his right of cross-examination, to learn the ability of the witness to judge in the premises, and what he takes into consideration in making up his judgment. *Ib.*

17. But in such cases, the opinions of the witnesses must be confined to the premises over which the right of way is taken. *Ib.*

RULES.

1. Under the Code, this court has power, by the establishment of proper rules, to supply defects in the title regulating the organization of this and the District Courts, so as to carry out the general spirit and intent of the system of practice, and make such other rules, consistent with law, as it may deem expedient. *McClellan v. McClellan*, 312.

2. In establishing such a rule, we know of none better than that provided for bringing a party into the District Court, by section 1725 of the Code, where there has been a return of not found. *Ib.*

SERVICE AND RETURN.

1. When the judgment is against the plaintiff in the court below, in cases where there has been no personal service on defendant, and no appearance made by him, and his residence is still unknown, the Code provides no method for giving notice of appeal. *McClellan v. McClellan*, 312.

2. In establishing such a rule, we know of none better than that provided for bringing a party into the District Court, by section 1725 of the Code, where there has been a return of not found. *Ib.*

3. The appellant must have his notice of appeal returned not found, before he makes his publication. *Ib.*

4. The notice must be published in a newspaper, as convenient as practicable to the court where the action was commenced, to be determined by the clerk of such court; and should be published for four successive weeks, the last publication to be at least fifteen days prior to the commencement of the term at which the appeal is to be heard. *Ib.*

5. The same proof and affidavit of the service will be required, as is provided for in similar cases in the District Court, by section 1826 of the Code. *Ib.*

6. If the appellee is a non-resident, and has an agent or attorney within the state, the notice should be given him, instead of by publication. *Ib.*

7. The papers referred to in section 1732 and chapter 133 of the Code, are not the private papers and notices between parties, in their ordinary business transactions, and which may relate to, or form the foundation of a right; but those intended in the statute, are such as pertain to, or may be required in, an action in court. *Hollingsworth, Ex. v. Snyder*, 435.

8. The service of a written notice to quit, by a landlord upon his tenant, cannot be proved by the written return and affidavit of the person making the service. *Ib.*

SPECIFIC PERFORMANCE.

1. An application to enforce the specific performance of a contract, is always addressed to the sound discretion of the chancellor, guided and governed by the general rules and principles of equity jurisprudence. *Young v. Daniels*, 126.

2. In such cases, relief is not a matter of right in either party, but is granted or withheld, according to the circumstances of each case, when such rules and principles will not furnish any exact measure of justice between the parties. *Ib.*

3. Where in a suit to enforce the specific performance of a contract to convey real estate, there was nothing showing any change in the value of the land; or that in the period intermediate between the sale and the offer to pay, there was any change of circumstances affecting the rights, interests or obligations of the parties; and where the vendee proposed to pay the consideration, and brought suit to compel a conveyance of the land, and had contracted to pay the highest rate of interest, before the vendor indicated any intention of declaring the contract at an end, *Held*, That there was nothing to justify the conclusion, that the contract was forfeited by the non-payment of the money, on the day it became due. *Ib.*

4. Where in a suit to enforce the specific performance of a contract to convey real estate, the bill alleged that the vendor was continuously a non-resident of the state; that at the time the notes became due, neither he nor any person for him, was at the place of payment, to demand payment; that the vendor has neither returned the notes of the vendee, nor given him notice of his election to consider the contract at an end; that within three months after the last note became due, the vendee, at the place where the notes were to be paid, and to the person who acted as the agent of the vendor in making the contract, offered to perform the contract on his part, and demanded a deed; and that said agent refused to perform said contract, and there was no other person there to perform the same; and where the vendee, within six months after such offer to perform, instituted suit to enforce the contract, and brought his money into court; *Held*, That the vendee had not been guilty of such negligence in his offer to pay the purchase money, as to forfeit all right to claim a specific performance of the contract. *Ib.*

5. A party seeking to enforce the specific performance of a contract to convey real estate, is not required to tender a deed to the respondent for execution, before bringing his suit. *Ib.*

6. Where in a suit for the specific performance of a contract to convey real estate, the bill alleged that the notes for the purchase money were to be paid

at a specified place; that the vendor was a non-resident of the state, and had revoked the power of his agent to receive the money; that the vendee applied within a reasonable time after the maturity of the notes, at the proper place, to pay them, and demanded a deed; and that there was no person there to receive the one, or execute the other; *Held*, That the vendee was not bound to follow the vendor, in order to proffer to him in person, a performance of the contract, and that he was excused from making a tender of the purchase money, before the commencement of the suit. *Id.*

7. Courts of equity will decree parties to perform that, which, in legal contemplation, they are able to perform, and not that which, it is manifest, they have no legal power to carry out; and if the decree is to be void and imperfect, and cannot be performed, a specific performance ought not to be decreed. *Ferrier v. Buzick*, 136.

8. Where it has become impossible for a party to perform his part of the contract, a court of equity will not decree such performance, but will either leave the party to his legal remedy, or retain the bill for the purpose of awarding compensation to the injured party. *Id.*

9. Where in a suit in equity to enforce the specific performance of a contract to convey real estate, the answer of the respondent alleged, and the evidence proved, that the vendor, before the commencement of the suit, had conveyed the land to other persons, who were not made parties, or charged with notice, the bill was dismissed. *Id.*

10. Where in a suit to enforce the specific performance of a contract to convey real estate, against the vendor and a subsequent purchaser, with notice of the rights of the original vendee, it appeared from the testimony, that the vendor had placed the original vendee in possession of the premises; that the said vendee had paid part of the purchase money, which the vendor still retained, and had made improvements on the land; that the notes for the unpaid portion of the purchase money, bore the highest rate of interest; that the land had enhanced in price; that the balance of the purchase money was brought into court; that the vendor had never put an end to the contract, by refunding the money paid, giving up the note for the balance due, and making, or offering to make, reasonable compensation for the improvements made; and that the subsequent purchaser from the vendor, had notice of the rights of the complainant; and where the suit to enforce the performance of the contract, was commenced in about three months after the last payment became due; *Held*, That the contract should be specifically performed. *Brink v. Morton et al.*, 411.

STATUTE.

1. Although the power of the judiciary to declare and hold an act of the legislature unconstitutional and void, is universally admitted, yet the exercise of that power, is considered of the most delicate and responsible nature, and is not to be resorted to, unless the case be clear, decisive, and unavoidable. *Sandoz et al. v. The State*, 165.

2. It is the duty of the courts, to give to a statute such a construction, if possible, as will sustain it. *Id.*

3. Where the language and provisions of a statute are consistent with a lawful end, and this is its apparent meaning, whilst another construction would give it an unlawful effect, it is the duty of a court to take that view which is lawful and consistent. *Id.*

4. A statute void in part, is not necessarily void as a whole. If sufficient remains to effect its object, without the aid of the invalid portion, the latter only should be rejected, and the former allowed to stand. *Id.*

5. The act entitled "An Act in relation to certain state roads therein named," approved January 22, 1853, is constitutional. *The State of Iowa ex rel. Weir v. The County Judge of Davis Co.*, 280.

6. It is the duty of the courts to give such a construction to an act, if possible, as will avoid the necessity of exercising the power of declaring an act of the legislature void, and uphold the law. *Id.*

7. In determining whether a law is constitutional, under section twenty-six of the third article of the constitution, which declares that every law shall embrace but one object, which shall be expressed in the title, the unity of object is to be looked for in the ultimate end designed to be attained, and not in the details leading to that end. *Id.*

STATUTE OF FRAUDS.

1. Although the language of our statute of frauds is somewhat different from that of the fourth section of 29 Charles II, yet it is so much like it in terms, that the English and American authorities upon the construction of the English statute, are entitled to the same consideration as upon questions at common law. *Westheimer v. Peacock*, 528.

2. Although the English statute provides that *no action shall be brought*, whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum, or note thereof, shall be in writing, &c., while ours provides that *no evidence of any such contract* is competent, unless in writing, the effect is the same in both cases. *Id.*

3. The meaning is, that such actions cannot be maintained, under either statute, unless the contract is in writing, as therein required, save in the exceptions provided for by our statute. *Id.*

4. Our statute, by so far innovating upon the original statute of frauds, as to allow the party making the alleged promise, to be called on to the witness stand, and his oral testimony, so obtained, to be evidence of the contract, never contemplated relaxing the rule, requiring an agreement to answer for the debt of another, to be in writing. *Id.*

5. J. P. executed his promissory note for a certain sum, payable in ninety days, and about the time of its maturity, stopped payment. Before, and after, the maturity of the note, the payees called upon the defendant, the father of J. P., and informed him that they were about to sue thereon, and attach the property of J. P. The defendant insisted that this should not be done, and said that he was getting his son's property into his hands, and that he would pay the note. The debt could have been made by attachment, but on account of this promise, suit was not brought. The defendant was asked to indorse the note, but declined, for the reason that it could then be sold to a banker, and he be sued upon it immediately. After this promise of defendant, the note was assigned to the plaintiff. J. P. was never released from his liability on the note; the promise of defendant was not evidenced by any writing signed by him, or by any person for him. The defendant being sued on this verbal promise, answered, denied the promise, or its validity, and pleaded the statute of frauds; and there being no evidence to show, that defendant did get his son's property into his hands, and the alleged promise being proved by one of the payees of the note, and not by the defendant himself, the defendant asked the court to instruct the jury as follows: "1. That unless the jury believe that J. P. was wholly released on said note, they must find for defendant. 2. That no evidence is competent to prove the alleged promise, other than that of defendant's handwriting, or that of his lawfully authorized agent, or the testimony of defendant himself, upon the witness stand," which instructions the court refused to give. *Held*, 1. That the promise was nothing more than one of those cases where A. becomes the surety for the debt of B., in consideration that the creditor will forbear to sue, or to prosecute a suit already commenced. 2. That the agreement to forbear, might be a good consideration to support the promise, if in writing, but not a consideration of such a character as to make a new and original transaction between the parties. 3. That it was error to refuse the instructions. *Id.*

SUBMITTING LAWS TO A VOTE OF THE PEOPLE.

1. The General Assembly cannot legally submit to the people, the proposition whether an act shall become a law or not. *Santo et al. v. The State*, 165.
2. The people have no power, in their primary or individual capacity, to make laws. *Ib.*
3. The whole of the act for the suppression of intemperance, approved January 22, 1855, is not rendered invalid, even though the submission to a vote of the people, as provided for by the eighteenth section of the act, should be held unconstitutional. *Ib.*
4. The eighteenth section of the act did not submit to the people the question, whether the act should become a law or not, and is not unconstitutional. *Ib.*

SUPPRESSION OF INTEMPERANCE.

1. The act entitled "An Act for the Suppression of Intemperance," approved January 22, 1855, is not in conflict with the constitution or laws of the United States. *Santo et al. v. The State*, 165.
2. The act for the suppression of intemperance, approved January 22, 1855, is a complete act in all its parts, without the eighteenth section. *Ib.*
3. The whole of the act for the suppression of intemperance, approved January 22, 1855, is not rendered invalid, even though the submission to a vote of the people, as provided for by the eighteenth section of the act, should be held unconstitutional. *Ib.*
4. The eighteenth section of the act did not submit to the people the question whether the act should become a law or not, and is not unconstitutional. *Ib.*
5. The statute does not embrace more than one object, nor objects not expressed in the title; and is not in violation of the twenty-sixth section of the first article of the constitution, which provides that every law shall embrace but one object, which shall be expressed in the title. *Ib.*
6. The act has been published, as required by the constitution of the state of Iowa. *Ib.*
7. A particular description of the place to be searched, or the property to be seized, is required by the act for the suppression of intemperance; and the charge alleged against the defendant is to be distinctly and fully stated. *Ib.*
8. The words "as particularly as may be," in the ninth section of the act for the suppression of intemperance, convey the idea of the greatest degree of certainty in the description of the place to be searched, or the property to be seized. *Ib.*
9. Under the statute, it is necessary to inform the defendant of the charge alleged against him, and it allows him to be confronted with the witnesses against him. *Ib.*
10. The statute does not authorize a destruction of property, without notifying the defendant; nor does it authorize a forfeiture and destruction of private property, without trial, and as a penalty for crime, which need not be proved. *Ib.*
11. Section 3361 of the Code, is applicable to cases under the act for the suppression of intemperance, and is not superseded by section ten of that act. *Ib.*
12. Where a complaint under the act for the suppression of intemperance, alleged that certain intoxicating liquors were "kept in a certain house occupied and kept by one S., on a certain lot, and intended by said S. to be sold unlawfully; and where a motion was made to quash the information, on the ground that while the liquor is charged as being in the house of defendant, no affidavit of a sale, at any time, was made as required by the proviso to the

ninth section of the act, which motion was overruled; *Held*, That the motion was properly overruled. *Sanders v. The State*, 230.

13. The word "house" in the ninth section of the act for the suppression of intemperance, approved January 22, 1855, is not equivalent to the words "dwelling-house," in the proviso to said section. *Id.*

14. Where certain intoxicating liquors were seized under the act for the suppression of intemperance, and the owner appeared and pleaded as a bar to the complaint and prosecution, a previous conviction of himself, for keeping said liquors for sale; *Held*, That the conviction of the owner for keeping, with intent to sell, is not a bar to a prosecution against the liquors themselves, as a nuisance, and for the abatement of the nuisance. *Id.*

15. And where in such a proceeding, the court refused to instruct the jury, that if the jury find from the evidence, that the owner of the liquors had previously been convicted of keeping said liquors, with intent to sell, they must find for the defendant; *Held*, That there was no error in the refusal to give the instruction. *Id.*

SURVEY.

1. In re-establishing a lost survey, course and distance must yield to fixed monuments. *Moreland v. Page*, 139.

2. All ascertained surrounding monuments must be allowed their due weight in determining the locality of the unascertained, under the system by which the survey was originally made. *Id.*

3. Where on a line of the same survey between remote corners, the whole length of which line is found to be variant from the length called for, in re-establishing lost intermediate monuments, as marking sub-divisional tracts, we are not permitted to presume that the variance arose from the defective survey of any part, but must conclude, in the absence of circumstances showing the contrary, that it arose from the imperfect measurement of the whole line, and distribute such variance between the several sub-divisions of such line, in proportion to their respective lengths. *Id.*

4. Unknown corners must be found by the corroborative testimony of all known corners, with as little departure as may be from the system adopted on the original survey, without giving preponderance to the testimony of any one monument above another. *Id.*

TIME.

1. In an agreement for the sale of land, which provides as follows: "But should the taxes, and the note above described, not be paid by the time they become due, then I reserve the right to sell the above-described land at any time thereafter, to any person or persons," time is of the essence of the contract. *Tomlinson v. Smith et al.*, 39.

2. Where a bill in chancery to enforce the specific performance of a contract to convey land, in which time was of the essence of the contract, alleged that the respondent had waived the performance of the contract as to time, and set up a contract as follows: "In April, 1854, in a conversation had at Bellevue, your orator informed said W. (the agent of respondent), that your orator had become the assignee of said B. (with whom the contract was made), in the contract aforesaid, and said W. agreed to wait on your orator for several months for payment of said note (the note given for the price of the land), and that he would convey the said land to your orator, on payment of said note and interest, providing that all the taxes were paid," as evidence of the waiver; and where the bill alleged further, that the complainant had paid all the taxes on the land; *Held*, That the subsequent contract alleged, was without mutuality or consideration, and was not sufficient to revive, and extend the time, on the original contract. *Id.*

3. In contracts relating to real estate, time may be of the essence of the contract. *Young v. Daniels*, 126.

4. But in equity, time is not deemed of the essence of the contract, unless the parties have so treated it, or it necessarily follows from the nature and circumstances of the contract. *Ib.*

5. Where a contract for the conveyance of real estate contained the following provision: "And it is expressly agreed by and between said parties, that in the event of the non-payment of said sum of money, or any part thereof, at the time herein limited, that then the said D. may elect to consider the contract at an end, and the said Y. shall be considered the tenant of D., holding over the termination of his lease;" *Held*, 1. That time had not been made of the essence of the contract, by the express stipulation of the parties. 2. That this provision cannot, of itself, be construed as making time material, without some evidence that the vendor elected so to treat it. *Ib.*

TITLE.

1. In this country, we must look to the government and its grants, for the source of all title. *Sullivan v. McLennan*, 437.

2. Where one co-tenant purchases in an incumbrance or adverse title, he is ordinarily held to do so, for all the co-tenants; but this doctrine does not apply to the case of co-occupants of the lands of the general government, where one shall have acquired title from the United States, in the absence of fraud, or special contract. *Ib.*

3. A tenancy in common can only be destroyed, either by uniting all the titles and interest in one tenant—thus bringing all the interests into one severalty; or by partition—giving all respective severalties. *Ib.*

TRESPASS.

1. An action of trespass *quare clausum fregit*, so relates to real property, as to authorize the prosecution of the suit in the county where the realty is situate, even though the defendant may reside in a different county. *Barnes v. Davis et al.*, 160.

2. An injunction should not issue in an ordinary case of trespass. *Crocker et al. v. Shaw et al.*, 496.

3. Where the defendants in an action of trespass, which is being continued, are entirely insolvent; or where the trespass has or may become a nuisance, or amounts to waste; or where numberless suits may have to be brought to make the remedy complete; or where the trespass is by a party occupying a fiduciary relation; or where the injury is of such a character that the loss would be irreparable, and not to be compensated by damages, an injunction to restrain the commission of the trespass, may properly issue. *Ib.*

TRUST AND TRUSTEE.

1. Parol evidence is not admissible to change an absolute deed into one of trust, unless there be fraud, accident, or mistake, alleged and proved. *Ratiff et al. v. Ellis*, 59. ✓

2. An express trust can be created or declared by writing, *only*. *Ib.* ✓

3. J. R. purchased the east half of lot seven, and the whole of lot eight, in block eight in Fairfield, in the county of Jefferson, on the 19th of May, 1839, for \$205.88; on the 9th of September, 1840, he took the bond of the county for a conveyance, and on the 6th of October, 1842, paid the purchase money; at a date which does not appear, he assigned the bond to E.; on the 9th of September, 1842, R. made a deed conveying this property to E. for the express consideration of \$500, and on the same day, E. conveyed to R. for the same

consideration, certain lands in Jefferson county; R. died in November, 1846, and E. in 1851. R. and E. were on terms of intimate friendship; R. having become excessively addicted to the use of ardent spirits, and being conscious that this habit was leading him to ruin, and being fearful (so the bill alleges), that he should squander this property, and leave his family destitute, put the title in E. with the intent, and on the express promise on the part of E., that he would hold in trust for R. and his family. There being no direct proof of this arrangement, it was attempted to be shown by evidence of the following facts: that E. repeatedly, after the death of R., spoke of the property as belonging to Mrs. R.; that he called it hers at various times, and under various circumstances; that he spoke of owing her rent for a part of the premises; that when he sold part of lot eight, he did it in consultation with her, and with her consent; that the note given for a part of the purchase money, though taken in his name, was placed in her hands, and the money paid to her, without objection; that at R.'s death, one P. was appointed administrator, and when the property of R. was inventoried, these lots were included as R.'s, but with a note appended, stating that the title was in E.; that E. was present when this inventory was made, and the lots included in it, and *knew* it, but made no objection; that P. resigned his administration, and E. was appointed in his place; that E. in his account rendered, made a charge against the estate of \$8.41, paid for the taxes of the years 1846 and 1847, and it was attempted to be shown that this sum was for the taxes on this property. In an action by the heirs of R. against the sole devisee of E., to recover the east one-third of lot eight, in block eight in the town of Fairfield, and the rents for the remainder of the lot, for several years, and for the purchase money for which the middle third was sold by respondent, and which she received; *Held*, That there was no legal evidence to establish an *express* trust, and that the complainants could not recover. *Id.*

4. A court of equity will not permit a trust to fail for want of a trustee. *Miller v. Chittenden et al.*, 315. ✓

5. A grant to trustees, for the use and benefit of a church to be afterwards organized, with no power in the trustees to create the beneficiary, or to appropriate the land, or funds arising therefrom, for any purpose, until such organization, will be upheld so as to pass the title, if such church shall afterwards, within a reasonable time, be so created or brought into existence, as to acquire and hold property, or be the recipients of a charity. *Id.*

6. In the meantime, where the property is in the hands of a trustee, and the object and purpose of the grant look to a future grantee, it will be held in abeyance. *Id.*

7. And it is not necessary that the trustee shall have the power to create the beneficiary, or proceed with the execution of the trust before such creation, in order to sustain and uphold such a grant or devise. *Id.*

8. *Marshall v. Chittenden et al.* (not reported), so far as it holds that the trustees under the deed of J. McK. to C. and others, dated December 25, 1846, after the death of said McK., held the estate for his heirs, overruled. *Id.*

9. Where land is purchased by one, with money furnished by another, a constructive trust arises, the former being a trustee for the latter. *Sullivan v. McLenane*, 437. ✓

10. While an advance of money, may create a resulting trust, it must be subject to the rights of others, and cannot be allowed to intervene to defeat prior and superior equities. *Id.*

VENUE.

1. The word *convenient*, in section 1708 of the Code, does not have reference alone to the county that is nearest in point of distance, or the one that can be soonest reached in miles' travel, from the county from which the venue is changed; but has a broader signification, and which county is the most

convenient, must be determined, to some extent, by the peculiar circumstances of each case. *Allen v. Skiff*, 433.

2. Where there is no showing to the contrary, the appellate court will presume that the county to which the venue has been changed, is the most convenient, within the meaning of the law. *Id.*

3. If the party complaining wishes to show error in the order for the change of venue, he should embody all the facts, upon which the court acted, in a bill of exceptions, so that this court can see that the county selected, is *not* the most convenient. *Id.*

4. The applicant for a change of venue, in addition to the costs of the transcript, should be required to pay the fair and legitimate costs of the term. *Id.*

VERDICT.

1. Where in an action on a note, the jury returned a verdict as follows: "The jury in the above case, find for the plaintiff the amount of the note and interest," and the court thereupon directed the clerk to assess the damages, and rendered judgment for the sum so assessed; *Held*, That the verdict was sufficiently certain, and that the court did not err in directing the assessment by the clerk, and rendering judgment against the defendant for the sum so assessed. *McGregor, Laws & Blackmore v. Armill*, 30.

WILL.

1. Where there is no express declaration in a will, barring the wife of dower, the intention to so bar her, must be deduced by clear and manifest implication from the instrument, founded on the fact that the claim of dower would be inconsistent with the will, or so repugnant to its dispositions, as to disturb and defeat them. *Corriell v. Ham*, 552.

2. The claim for dower, to be inconsistent with the will, must defeat, or interrupt, or disappoint some of its provisions. *Id.*

3. Where a husband devised to his wife, during her natural life, and so long as she remained unmarried, &c., all his real and personal property; and where the wife, subsequently to the death of her husband, claimed her dower in certain real estate of her husband, sold on execution against him, previous to his death, to which she had not released her dower; *Held*, 1. That the claim for dower, so far from disappointing or interfering with the will, harmonized with it, and went to the same end. 2. That even if the wife had claimed the property under the will, she could not be bound by its provisions, if there was no title in her husband. *Id.*

WITNESS.

1. Where suit was brought against the maker and indorser of a note, which read as follows: "Oct. 28, 1854. Ten days after date, I promise to pay David H. Means, one hundred dollars, the balance due on house and lot, No. 2, B. 19, when said wood-work on said house is finished, for value received. Thomas M. Sloan;" indorsed as follows: "For value received, I assign the within to Samuel Hickman, Nov. 14, 1854. D. H. Means;" and where the maker of the note answered, that the note was given as the balance due on the house and lot, and the wood-work thereon, by the payee; that the work had not been completed according to the contract; and that the consideration had therefore failed, which answer was not replied to by the plaintiff; and where the indorser made no defence to the action, but replied to the answer of his co-defendant, alleging that he had performed all the work required of him by his contract with the maker, and that the consideration had not failed; and where on the trial, the indorser was offered as a witness

by the plaintiff, to show the complete performance of the work mentioned in the note, to which defendant objected, because of the interest of the witness, which objection was overruled, and the witness permitted to testify; *Held*, That under the issue made, the indorser was not a competent witness for the plaintiff against the maker of the note. *Hickman v. Sloan*, 64.

2. Where in an action of trespass for an assault and battery against a father and son, the plaintiff dismissed his suit as against the son; and on the trial, the father offered the son as a witness, who, being objected to, was held not be a competent witness, on the ground of being a party to the record, and interested in the result of the suit; *Held*, That the plaintiff, by dismissing his suit as to the son, became liable for the costs consequent upon his having been made a party, and the competency of the son as a witness, was as undoubted as if he had never been connected with the record. *Hill v. Rogers*, 67.

3. Under section 2388 of the Code, a negro cannot be allowed to give testimony in a cause where a white person is a party. *Motts v. Usher & Thayer*, 75.

4. And where in an action wherein a negro was the plaintiff, and the defendants were white persons, the defendants offered a negro as a witness, who was objected to, on the ground of incompetency, which objection was sustained; *Held*, That the witness was properly excluded. *Id.*

5. Where in an action for a joint libel against several defendants, to which there was a joint answer of not guilty, some of the defendants filed their affidavit, setting forth that certain of their co-defendants were material and necessary witnesses for them—that they could prove matters material to their defence by said co-defendants, which could not be proved by any other witnesses—and that justice required they should have separate trials, upon which affidavit a motion for separate trials was made and overruled, on the ground that such co-defendants would not be competent witnesses on the trial of the others; *Held*, 1. That where such a motion is granted or refused by the court below, in the exercise of its discretion, this court will require a very strong showing, before it will hold such discretion to have been improperly exercised. 2. That under the circumstances stated, their co-defendants were not competent witnesses for the parties asking separate trials. *Forshee v. Abrams et al.*, 571.

6. Section 2390 of the Code, which provides, that a person who has a direct, certain, and legal interest in the suit, is not a competent witness, unless called on by the opposite party, is but declaratory of the rule stated conversely in the books, that a person is competent, unless he has such an interest. *Cutter v. Fanning*, 580.

7. The preceding section, which provides, that facts which have heretofore caused the exclusion of testimony, may still be shown, for the purpose of lessening its credibility, also recognizes another rule before settled, that there must be some clear and adequate reason for the exclusion of testimony, otherwise it will be received, and the credibility of the witnesses left to the jury. *Id.*

8. The *true test of interest* is, that the witness will either lose or gain by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him, in some other action. *Id.*

9. If the interest is of a doubtful nature, the objection goes to the credit of the witness, and not to his competency. *Id.*

10. Where it is not clear that a witness is incompetent for all purposes, the better practice is, to let him be sworn, and raise the question as to his competency when an improper question is asked. *Id.*

11. Where the witness is incompetent for all purposes, the objection should be raised before he is sworn. *Id.*

12. Where in an action for the conversion of certain sheep, the defendant called a witness, who testified that one R. F. was a partner of defendant, and

joint owner of the flock of sheep, which was being driven by defendant (with which it was alleged that the plaintiff's were mixed and driven off); that they were in partnership as to certain farms in Ohio; and that he had heard defendant say, that all the sheep in the flock were his; and where the defendant then called the said R. F. as a witness, to whose examination the plaintiff objected, for the reason that the testimony of the former witness, showed the said R. F. to be so far interested as to render him incompetent, which objection was sustained by the court, without examining the said R. F. on his *voir dire*, and the witness excluded; *Held*, That the court erred in excluding the testimony of the witness. *Id.*

WRIT OF ERROR.

1. The averments in the affidavit for a writ of error to remove proceedings from before a justice of the peace, amount to nothing, unless there is a response to the same in the return of the justice. *Stone v. Murphy*, 35.

2. There is no express statutory provision, limiting the time within which the proceedings of a justice of the peace must be removed into the District Court, by writ of error; nor is there anything from which, by any fair implication, the time can be said to be limited. *Porter & Lucas v. Helmick*, 87.

3. Where a writ of error was dismissed on motion, on the ground that it was not sued out within the time prescribed by law; *Held*, That the motion was improperly sustained. *Id.*

4. And where the bill of exceptions stated, as an additional reason for dismissing the writ of error, that an appeal had been previously taken by the same party and disposed of; *Held*, That the question could not be raised in this manner. *Id.*

5. A party is not confined to twenty days after judgment is rendered against him by a justice of the peace, within which to sue out a writ of error. *Mudgett v. Park*, 287.

6. A writ of error on the part of the state, cannot be sued out in a criminal case. *The State v. Johnson*, 549.

Ex. G. H. T.

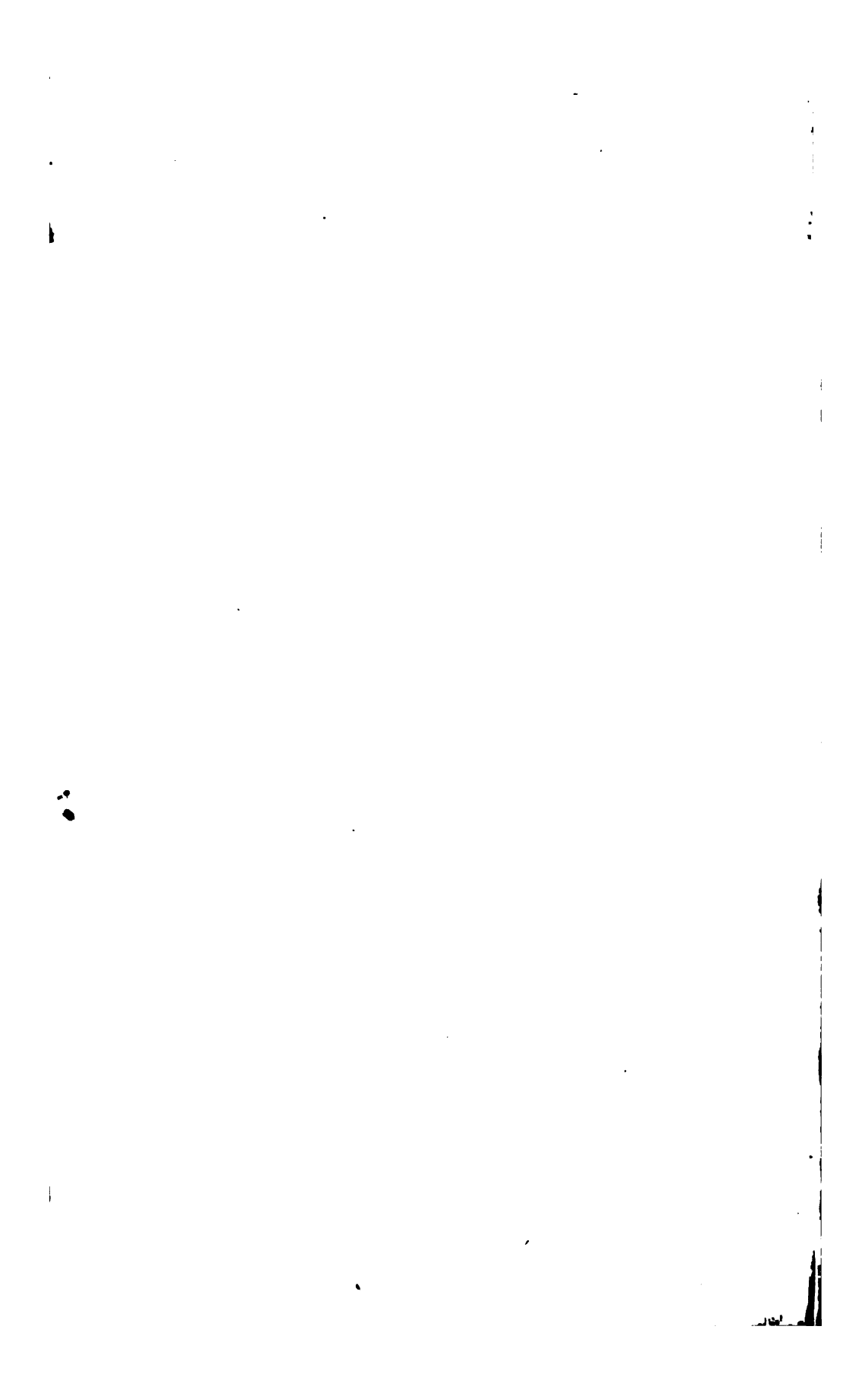
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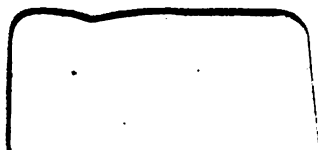


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